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Supreme Court of the United States

OCTOBER TERM, 1950

No. 329

AMALGAMATED ASSOCIATION OF STREET,
ELECTRIC RAILWAY AND MOTOR COACH EM-
PLOYEES OF AMERICA, DIVISION 998, ET AL.,
PETITIONERS,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF WISCONSIN

PETITION FOR CERTIORARI FILED SEPTEMBER 22, 1950.

CERTIORARI GRANTED NOVEMBER 6, 1950.

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1949.

No. 146.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Plaintiff and Respondent,

vs.

**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC
RAILWAY AND MOTOR COACH EMPLOYEES OF
AMERICA, DIVISION 998, GEORGE KOECHER,
CHARLES BREHM, THOMAS MURACH, RAYMOND
KNUTSON, JACK WERY, JOE DERSINZSKI, HOWARD
LYNCH, HERMAN WEBER, PAUL BREHM, PAUL
KRAFT, STEVE MALICK, WILLIAM BUCHE, GEORGE
SLOAN, EDWIN BECKER and OTHMAR MISCHO,**
Defendants and Appellants.

APPELLANTS' BRIEF
and
APPENDIX.

PADWAY, GOLDBERG & PREVIANT,
511 Warner Theatre Building,
212 West Wisconsin Avenue,
Milwaukee 3, Wisconsin,
Attorneys for Defendants and
Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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ELECTRIC RAILWAY AND MOTOR COACH EM-
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
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This is an appeal from a judgment of the Circuit Court of Milwaukee County, Honorable Daniel W. Sullivan, Judge presiding, entered on the 11th day of April, 1949, adjudging and decreeing that defendants, and each of them, and the employees, servants, agents and members of said defendants, be perpetually restrained and enjoined from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the passenger service of the Milwaukee Electric Railway and Transport Company in the State of Wisconsin, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company.

72-89

• DECISION OF THE COURT.

(Venue and Title Omitted.)

72 This action for injunctive relief is brought pursuant to Sec. 111.63 Stats. to prevent threatened violations of and to compel compliance with Subchapter III of Chap. 111 Stats.

The complaint alleges that the defendant, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, is the collective bargaining representative of all the employes of the Milwaukee Electric Railway and Transport Company, en-

gaged in the business of furnishing public passenger transportation in the state of Wisconsin, and it is alleged that said company is a public utility employer (employing approximately 2700 employes) within the meaning of Sec. 111.51 Stats.; that a contract between Division 998 and the company covering wages and working conditions of said employes expired December 31, 1948; that the company and Division 998 have attempted unsuccessfully to negotiate an agreement for 1949; that a conciliator was appointed pursuant to Sec. 111.54 Stats.

"That on or about January 3, 1949, the membership of Division 998 in a secret referendum voted to authorize its general executive board to call a strike at such time as the board should deem proper; that pursuant to such action of the membership the general executive board fixed the date of a strike of the employes represented by said Division 998 to begin at 4 o'clock A. M. on Wednesday, January 5, 1949; and that the defendants released for publication in newspapers of general circulation in Milwaukee County, Wisconsin, an announcement of said action by the membership and by the general executive board."

"That by such actions and other conduct the defendants did, during the month of January, 1949, instigate, induce, conspire with and encourage persons employed by the company to engage in a strike and work stoppage; that the company is engaged in rendering an essential service to the public in the State of Wisconsin,

and that the continuance and uninterrupted service of the employees who are represented by Division 998 is necessary to a continuance of the performance of such essential service; and that a strike or work stoppage of said employees would cause an interruption of an essential service."

74 "That in obedience to a temporary restraining order issued by the Circuit Court of Milwaukee County, the strike so authorized and directed by the membership and the general executive board of Division 998 was temporarily postponed and abandoned to await the outcome of the action instituted by this complaint."

"That the defendants threaten to instigate, induce, conspire with and encourage other persons to engage in a strike which will cause interruption of an essential service, and will continue to do so, in violation of Sec. 111.62 of the Wisconsin Statutes unless restrained by judgment of this court."

The answer of the defendant admits the allegations of the complaint to the effect that the employees involved "are engaged in supplying the company's public transportation service." However, the defendants deny the allegation of the complaint that the company "is a public utility within the meaning of Sec. 111.51 of the Wisconsin Statutes", and the particular allegation of paragraph 8, above quoted to the effect that the company is rendering an "essential service to the public" as such terms are used in the Wisconsin Statutes.

Sec. 111.51 (1) provides:

“ ‘Public utility employer’ means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employees.”

Sec. 111.51 (2) defines “essential service” as “furnishing . . . public transportation . . . to the public in this state.” Paragraph 5 of the 75 complaint, admitted by the answer, alleges that the 2700 employees of the company are engaged in furnishing such public transportation service. The records of the Public Service Commission, of which the Court will take judicial notice, attest to the fact that it is engaged in such “essential service.” **Wisconsin Power & Light Co. v. Beloit**, 215 Wis. 439. Both the rates charged and the service rendered to the public is subject to regulation by the Commission under Chapters 193-194 Stats. and its service may not be discontinued without the consent of the Commission. Sec. 194.26 Stats. The answer (par. IV) alleges that the Company, with the aid of the employees represented by Division 998 transport in excess of 100,000,000 passengers annually.

The denial by the defendants that the Company is a “public utility employer” as defined in Sec. 111.51 (1) is based upon the contention, ad-

vanced in the companion case, No. 217-441, and considered in the latter case, that the company is engaged in the "railroad" business and therefore exempted from the provisions of subchapter III.

The answer of the defendants alleges further that upon the termination of a strike in the year 1934 "the company and the union agreed upon a method for the settlement of all future disputes, which method has resulted in fourteen years of uninterrupted service to the public, and which method has always been considered by both parties as adequate for the resolution of all differences which might arise between them"; that such method consisted in submitting disputes to "final and binding arbitration", and under which a similar dispute was settled in connection with the terms and provisions of the 1948 agreement; that it was the unilateral and exclusive action of the company which resulted in the termination of the 1948 agreement, including that part of such agreement which, if not terminated, would have required the parties to arbitrate their differences in the manner aforesaid"; that Division 998 has been and still is willing to settle said dispute by voluntary arbitration, as aforesaid, and has repeatedly offered so to do.

Further answering the amended complaint, the defendants admit the appointment of a Conciliator but deny that the plaintiff had the authority to make the appointment; that the union met with the Conciliator "subject to the objections

which it had previously made to the jurisdiction of the Board to appoint such Conciliator", but that the company, although numerous offers were made by the union in an effort to settle the contract, did not recede from its original position and that in fact the final offer of the company before the Conciliator was less favorable than its prior offer; that the company did not enter into such conciliation in good faith, nor did it carry on collective bargaining in good faith; that the company has requested the plaintiff "to seek an injunction in this case for the purpose of preventing the union from engaging in collective bargaining and other activities for the mutual aid and protection of the members of the union; that on February 9, 1949, the defendants filed a charge with the National Labor Relations Board, alleging that the company had and was continuing to commit unfair labor practices under the provisions of Sections 8 (a) (1) and (5) of the National Labor Relations Act by reason of the conduct immediately above set forth, and that such matter is now pending before the National Labor Relations Board."

Paragraph IV of the answer alleges facts intended to show that the Company is engaged in interstate commerce. Among the facts alleged are (a) that it is engaged in furnishing transportation service for thousands of employes of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce; (b) that the rolling stock equipment and material used by the com-

pany are procured by it in great measure from points outside of the state, the total value of the rolling stock recently acquired being in excess of \$2,000,000; that the gross operating revenue is in excess of \$16,000,000 annually and that it transports in excess of 100,000,000 passengers annually; (c) "that the National Labor Relations Board in December, 1947, pursuant to the terms and provisions of the National Labor Relations Act, and upon the insistence of the company that the terms of such act be complied with, assumed jurisdiction over a controversy respecting the signing of a union security agreement under the provisions of the National Labor Relations Act, conducted an election among the employees of the company represented by the union, and certified that the union had successfully complied with all of the provisions of the National Labor Relations Act, and could enter into a union security agreement with the company; that the company is engaged in a business affecting interstate commerce and in interstate
78 commerce, and any interruption in its business as the result of a labor dispute with its employees would affect interstate commerce within the meaning and provisions of the National Labor Relations Act, (49 Stats. 449, U. S. Code Title 29, Paragraph 151-166)."

A reply was filed by plaintiff in which it is alleged that the various issues, except as hereinafter referred to, were before the court in Action No. 217-441 in this court and decided adversely to the contentions of the defendants.

The reply also denies the allegations of Paragraph VI of the answer, that there is an existing agreement for voluntary arbitration of labor disputes and that whatever agreement there may have existed has expired and has not been renewed; that the Conciliator has been unable to effectuate a settlement of the dispute and that he has so reported to the Board, and did not report any failure on the part of either party to bargain in good faith; that no charge of unfair practice or violation of law has been filed with the Board. Denies that this action is maintained at the request of the company but that it is brought at the instance of the Governor "in the interest and for the benefit of the public generally." Further alleges that the facts alleged in said Paragraph VI of the answer "are immaterial and have no bearing upon the issue as to whether an injunction should issue pursuant to Sec. 111.63 Stats."

Plaintiff moves for judgment on the pleadings.

79 The issue presented is therefore whether upon the facts admitted by the answer, either expressly or by failure to deny, plaintiff is entitled to judgment. **Madregano v. Wisconsin Gas & Elec. Co.**, 181 Wis. 611; **Kenner v. Edwards Realty & Finance Co.**, 204 Wis. 575; **Direct Service Oil Co. v. Wisconsin Ice & Coal Co.**, 218 Wis. 426; 4 Bryants, Wis. Proc. (Boesel & Henderson), Secs. 563, 303; Sec. 270.63 Stats. For the purposes of this motion, it must be conceded therefore (a) that the company is engaged in interstate commerce and subject to the National Labor Relations Act, and (b) that the facts, but not the legal conclusions stated in Paragraph VI of the answer, are true.

Since the decision filed by this court in the Declaratory Relief Action, No. 217-441, three decisions have been rendered by the Supreme Court of the United States, clarifying the application of the National Labor Relation Act, as follows: **La Crosse Telephone Company v. Wis. Emp. Rel. Board**, decided Jan. 17, 1949; **International Union U. A. W., A. F. L., Local 232, v. W. E. R. B.** (decided Feb. 28, 1949); and **Algoma Plywood and Veneer Company v. W. E. R. B.** (decided Mar. 7, 1949). The **La Crosse** case reversed 251 Wis. 583. The holding of the U. S. Supreme Court in the **La Crosse** case is thus summarized in **International Union etc., Local 232, v. W. E. R. B.**, as follows:

80 "This case is not analogous to **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767, on which petitioners rely. There the state board undertook to determine the bargaining unit in an industry, an identical question which the federal Board was authorized to determine, and the two had deliberately laid down contrary policies to govern decisions of this same matter. In that case, of course, the federal policy was necessarily given effect as the supreme law of the land. See also **La Crosse Telephone Corporation v. Wisconsin Employment Relations Board**, ante p." (Emphasis added.)

The decision of the U. S. Supreme Court in **International Union, etc., Local 232, v. W. E. R. B.**, affirmed the holding of our Supreme Court in 250 Wis. 550. The decision of the former court,

in my opinion, conclusively settles all of the issues raised in the case at bar, favorably to the contentions of the plaintiff. In substance, the court holds that the right to "**strike**" and "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, conferred in general terms by Secs. 7 (Sec. 157 U. S. C. A.) and 10 (Sec. 163 U. S. C. A.), hereinafter discussed, are not absolute rights, beyond the control of the states in the exercise of their police powers. These rights, it is held in **Local 232** and in the still later **Algoma** case, must be construed in the light of the decisions of the courts, "and other Acts and state laws", regulating and in proper cases even prohibiting the exercise thereof; that the National Act does not confer upon the National Board the exclusive power to prevent "any unfair labor practice," that in fact the National Board is given exclusive jurisdiction to prevent only the unfair labor practices defined in Sec. 8 (Sec. 158 U. S. C. A.), none of which are applicable here. The states are free to define and prohibit all other unfair labor practices, even though they affect interstate commerce. Sec. 8 (158) of the Federal Act, it is
81 to be noted, deals only with specific unfair labor practices on the part of the **employer** and **employee**. It does not deal with or prohibit reasonable regulations, enforceable by the state, for the protection of the interest of the **public**. **Local 232**, affirmed in the **Algoma** case, holds: "State regulation of practices covered by Federal law is precluded only where the latter expressly or

by clear implication indicates an intention to pre-empt the field." In every case involving a conflict between the Federal and State Acts "The substantial issue is whether Congress has protected the union conduct which the state has forbidden, and hence the state legislation must yield." An analysis of both of the cases show that there is involved here no federally protected right which the state has prohibited, or any intention on the part of the Federal Act to "pre-empt" the field.

In **Local 232**, the validity of a ruling of the Wisconsin court that a "sit down" strike, so called, was an unfair labor practice prohibited by Sec. 111.06 (2) (e) and (h) was upheld. It was contended upon the appeal to the U. S. Supreme Court the National Act "confers upon or recognizes and declares in unions and employees certain rights, privileges or immunities in connection with strikes and concerted activities, and that these are denied by the state's prohibition as laid down in this case."

Continuing, the U. S. Court stated the contentions of the Union, which are identical with those here advanced:

82 "The argument is that two provisions, found in Paragraphs 7 and 13 of the Labor Relations Act, not relevantly changed by the Labor Management Act of 1947, grant to the union and its members the right to put pressure upon the employer by the recurrent and unannounced stoppage of work. Both

Acts provide that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in **concerted activities**, for the purpose of collective bargaining or other mutual aid or protection. Because the acts forbidden by the Wisconsin judgment are concerted activities and had a purpose to assist labor organizations in collective bargaining, it is said to follow that they are federally authorized and thereby immunized from state control."

Sec. 7 (Sec. 157, U. S. C. A.) provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except, to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3)^a of this title. As amended June 23, 1947, 3:17 p. m. E. D. T., c. 120, Title I, Par. 101, 61 Stat. 140."

83

Sec. 13 (Sec. 163, U. S. C.) is quoted, **Local 232**, with 1947 amendments in **Local 232** case, as follows:

“Reliance also is placed upon Par. 13 of the Labor Relations Act, which provided, ‘Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.’ 49 Stat. 449, 457. The 1947 Amendment carries the same provision but that Act includes a definition. Section 501 (2) says that when used in the Act ‘The term “strike” includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or concerted interruption of operation by employees.’ 61 Stat. 161.”

In Local 232 it was pointed out concerning “sit down strikes” that “Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. • • •”

“Congress has not seen fit in either of these Acts to declare either a general policy or to state specific rules of labor relations over which the several states traditionally have exercised control. Cf. Securities Act of 1933, Par. 18, 48 Stat. 74, 85, 84 15 U. S. C., Par. 77 (r); Securities Exchange Act of 1934, Par. 28, 48 Stats. 881, 903, 15 U. S. C., Par. 78 (bb); United States Warehouse Act, before and after 1931 Amendment, 39 Stat. 486, 490, 46 Stat. 1465, 7 U. S. C., Par. 269. However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is

equally true of the Labor Management Act of 1947, that **'Congress designedly left open an area for state control'** and that **'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.'** **Allen Bradley Local v. Wisconsin Employment Relations Board**, 315 U. S. 740, 750, 749." (Emphasis added.)

It was further held that the only effect of Sec. 7 (Sec. 157, U. S. C. A.) was to declare that "concerted activities" were no longer to be classified as "conspiracies" and prohibited as such. "No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert."

The court further held that the Federal Act did "not grant a dispensation for the strike but to outlaw strikes where undertaken to enforce what the Act calls unfair labor practices" as defined in the Federal Act. " * * * And Par. 13 plus the definition only provides that 'Nothing in this Act . . . shall be construed so as to interfere with or impede' the right to engage in these activities. **What other Acts or other state laws** 85 **might do is not attempted to be regulated by this section.** Since reading the definition into Par. 13 confers neither federal power to control the ac-

tivities in question nor any immunity from the exercise of state power in reference to them, it can have no effect on the right of the state to resort to its own reserved power over coercive conduct as it has done in this instance." (Emphasis added.)

Discussing the applicability of then existing court rulings with reference to which Secs. 7 and 13 were enacted and the "other Acts, or other state law" permissible under the National Labor Relations Act, the court held:

"This provision, as carried over into the Labor Management Act, does not purport to create, establish or define the right to strike. On its face it is narrower in scope than Sec. 7—the latter would be rather meaningless if 'strike' is a broader term than 'concerted activity.' Unless we read into Sec. 13 words which Congress omitted and a sense which Congress showed no intention of including, all that this provision does is to declare a rule of interpretation for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. **It did not purport to modify the body of law as to the legality of strikes as it then existed.** This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common

law, nor the Fourteenth Amendment, confers the absolute right to strike.' **Dorchy v. Kansas**, 272 U. S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. **Duplex Co. v. Deering**, 254 U. S. 443, 488. This Court also adhered to that view, **Thornhill v. Alabama**, 310 U. S. 88, 103. The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the Labor Relations Act. **Labor Board v. Jones & Laughlin**, 301 U. S. 1, 33." (Emphasis added.)

"As to the right to strike, however, this Court, quoting the language of Sec. 13, has said, 306 U. S. 240, 256, 'But this recognition of "the right to strike" plainly contemplates a lawful strike—the exercise of the unquestioned right to quit work,' and it did not operate to legalize the sit-down strike, which state law made illegal and state authorities punished. **Labor Board v. Fansteel Corp.**, 306 U. S. 240. Nor, for example, did it make legal a strike that ran afoul of federal law,

Southern S. S. Co. v. Labor Board, 316 U. S. 31; nor one in violation of a contract made pursuant thereto, **Labor Board v. Sands Mfg. Co.**, 306 U. S. 332; nor one creating a national emergency, **United States v. United Mine Workers**, 330 U. S. 258."

The opinion then quotes from the report submitted by the House Committee of Conference showing that the foregoing was the intention of the framers of the Act. Moreover, there was "real concern" that the inclusion of a provision specifying certain specific conduct as unfair labor practices "might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act."

Applying the principles above set forth, the U. S. Supreme Court in **Algoma Plywood and Veneer Company v. Wisconsin Employment Relations Board**, affirming 252 Wis. 549, held that an employer who sought to enforce a "maintenance-of-membership" agreement against non-assenting employees was properly adjudicated to be guilty of an unfair labor practice under Sec. 111.06 (1) (c) (1) of the Wisconsin Act, because the provision had not been approved a two-thirds vote of the employees, even though the provision was permissible under the Federal Act.

88 The decision of the U. S. Supreme Court in the **Algoma** case also answers the contention that the making of certain applications to the Federal Board have had the effect of now barring the State Board from acting in matters within its

jurisdiction and as to which state action is not forbidden by the Federal Act.

The contention that plaintiff is barred from the relief sought by reason of arbitration provisions of previous contracts is not valid. All contracts are subject to the valid exercise of the police power of the state. Whatever the rights of the company might be if it were here seeking relief is immaterial. The right of the plaintiff under Sec. 111.63 to proceed in the public interests is clear.

Neither is there merit in the contention that an injunction will not issue to restrain a crime (Sec. 111.62 Stats.). **International Union v. Wisconsin E. R. Board**, 250 Wis. 550; **State ex rel. Cowie v. LaCrosse Theaters Co.**, 232 Wis. 153.

The pleadings show that all the facts essential to the relief sought exist. Sec. 111.62 declares it unlawful "for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or work stoppage which would cause an interruption of an essential service." The essential allegations of paragraphs 7, 8, 9 and 10, 89 which are not denied, establish that defendants have and, unless restrained, will do the acts forbidden by Sec. 111.62. Sec. 111.63 provides the remedy of injunction. The statutory conditions have been met. 28 Am. Jur., pp. 202, 230.

The relief prayed for will be granted.

11-12

ORDER TO SHOW CAUSE.

(Venne and Title Omitted.)

Upon reading and filing the complaint of the Wisconsin Employment Relations Board in this action and the affidavit of Lawrence E. Gooding, Chairman of such Board, and on motion of Thomas E. Fairechild, Attorney General:

It Is Ordered that the defendants show cause before the Honorable Calendar Assignment Judge of the Circuit Court of Milwaukee County at the Court Room of said Court in the Court House, Milwaukee, Wisconsin, on the 7th day of January, 1949, at 2 P. M. of said day why a temporary injunction should not be granted restraining said defendants, and each of them, and employes, servants and agents and all members of the Union, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, from calling a strike, going out on a strike, causing any work stoppage or slowdown which would cause an interruption of the public passenger transportation service rendered by the Company, The Milwaukee Electric Railway and Transport Company, and from instigating, inducing, conspiring with or encouraging any such strike, slowdown or work stoppage.

- 12 It Is Further Ordered that until the hearing of said Order to Show Cause the defendants do absolutely desist and refrain from calling a strike, going out on a strike, causing any work stoppage or slowdown which would cause an interruption

of the public passenger service of the Company, and from instigating, inducing, conspiring with or encouraging any such strike, slowdown or work stoppage.

Dated this 4th day of January, 1949.

13 **Summons.**

14 **COMPLAINT.**

(Venue and Title Omitted.)

Now comes the Wisconsin Employment Relations Board, the plaintiff above named, by Thomas E. Fairchild, Attorney General Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, who bring this action at the request of the Honorable Oscar Rennebohm, Governor of the State of Wisconsin, and for a cause of action alleges and shows to the Court:

1. That the Wisconsin Employment Relations Board is, and at all times mentioned herein was, an administrative body created and existing pursuant to Chapter 111 of the Wis. Statutes for 1947; and that L. E. Gooding is the Chairman and J. E. Fitzgibbon and Henry C. Rule are members of said Board.

2. That the Union, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as "Division 998," is an unincorporated voluntary labor organization which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin.

3. That the defendants, George Kocchel and Charles Brehm, are the President and Secretary, respectively, of said Division 998, and are residents of the City of Milwaukee, Milwaukee County, Wisconsin; and that the defendant, Othmar J. Mischo, is the Secretary and Treasurer of the International Union with which said Division 998 is affiliated, and that said defendant is an agent of Division 998 for purposes of collective bargaining.

4. That the Milwaukee Electric Railway and Transport Company, hereinafter called the "Company," is a Wisconsin corporation organized and existing pursuant to the provisions of Chapter 180 of the Wis. Stats. and is engaged in the business of furnishing public passenger transportation in the State of Wisconsin and is a Public Utility employer within the meaning of Section 111.51 of the Wis. Stats.

5. That the defendant, Division 998, is the collective bargaining representative of all of the employees of the Company in its Operating and Maintenance Departments, comprising approximately 2,700 employees, which departments are engaged in supplying the Company's public passenger transportation service.

6. That a contract between Division 998 and the Company covering wages and working conditions of said employees expired December 31, 1948; that the Company and Division 998 have attempted unsuccessfully to negotiate an agreement for the year 1949; that the Company has

petitioned the plaintiff for the appointment of a conciliator pursuant to Section 111.54 of the Statutes; and that the Company's petition has been scheduled for hearing by the Complainant on January 5, 1949.

7. That on January 4, 1949, the defendant, Division 998, released for publication in newspapers of general circulation in Milwaukee County, Wisconsin, a statement to the effect that the General Executive Board of Division 998 ordered a strike of the employees of the Company commencing at 4:00 o'clock A. M., Wednesday, January 5, 1949; that in connection with that release the defendant, Othmar J. Mischke, stated for publication on behalf of said Division 998 "We are not going to cooperate with the State Board in this matter."

16 8. That by such actions and other conduct the defendants have during the month of January, 1949, instigated, induced, conspired with and encouraged persons employed by the Company to engage in a strike and work stoppage; that the Company is engaged in rendering an essential service to the public in the State of Wisconsin, and that the continuance and uninterrupted service of the employees, who are represented by Division 998, is necessary to a continuance of the performance of such essential service; and that a strike or work stoppage by said employees would cause an interruption of an essential service.

9. That the defendants threatened to instigate, induce, conspire with and encourage other per-

sons to engage in a strike which will cause an interruption of an essential service and will continue to do so in violation of Section 111.62 of the Wis. Stats. unless restrained by judgment of this Court.

10. That your Complainant has responsibilities under Section 111.63 of the Wis. Stats. for enforcement of compliance with the provisions of Section 111.62.

11. That the conduct of the defendant in instigating, inducing, conspiring with and encouraging other persons to engage in a strike will work irreparable injury to the complainant and to the citizens of the State of Wisconsin; will put the complainant to the necessity of bringing a multiplicity of suits; and that your complainant has no adequate remedy at law for redress against such conduct.

12. Wherefore, the Complainant demands judgment that the defendants; and each of them, and employees, servants, and agents and all members of the Union, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, be perpetually restrained and enjoined from calling a strike, going out on strike, causing any work stoppage or slowdown which would cause an interruption of the public passenger service of the Company, The Milwaukee Electric Railway and Transport Company, in the State of Wisconsin, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause

interruption of the public passenger service of said Company.

18 Verification.

19 **AFFIDAVIT.**

(Venue and Title Omitted.)

State of Wisconsin, }
Milwaukee County. } ss.

L. E. Gooding, being first duly sworn on oath, says that he now is and at all of the times mentioned herein was a member of and Chairman of the Wisconsin Employment Relations Board, an administrative body created and existing pursuant to Chapter 111 of the Wis. Stats. for 1947, and that he makes this affidavit in such capacity.

That the Union, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as "Division 998", is an unincorporated voluntary labor organization which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin.

That the defendants, George Koechel and Charles Brehm, are the President and Secretary respectively of said Division 998 and are residents of the City of Milwaukee, Milwaukee County, Wisconsin; and that the defendant, Othmar J. Mischo, is the Secretary and Treasurer of the International Union with which said Division 998 is affiliated, and that said defendant is an agent of Division 998 for purposes of collective bargaining.

That The Milwaukee Electric Railway & Transport Company, hereinafter called the "Company," is a Wisconsin corporation organized and existing pursuant to the provisions of Chapter 180 of the Wis. Stats. and is engaged in the business of furnishing public passenger transportation in the State of Wisconsin and is a Public Utility employer within the meaning of Section 111.51 of the Wis. Stats.

That the defendant, Division 998, is the collective bargaining representative of all of the employees of the Company in its Operating and Maintenance Departments, comprising approximately 2,700 employees, which departments are engaged in supplying the Company's public passenger transportation service.

That a contract between Division 998 and the Company covering wages and working conditions of said employees expired December 31, 1948; that the Company and Division 998 have attempted unsuccessfully to negotiate an agreement for the year 1949; that the Company has petitioned the Plaintiff for appointment of a conciliator pursuant to Section 111.54 of the Statutes; and that the Company's petition has been scheduled for hearing by the Complainant on January 5, 1949.

That on January 4, 1949, the defendant Division 998 released for publication in newspapers of general circulation in Milwaukee County, Wisconsin, a statement to the effect that the General Executive Board of Division 998 ordered a strike

of the employees of the Company commencing at 4:00 o'clock A. M.

That by such actions and other conduct the defendants have during the month of January, 1949, instigated, induced, conspired with and encouraged persons employed by the Company to engage in a strike and work stoppage; that the Company is engaged in rendering an essential service to the public in the State of Wisconsin, and that the continuance and uninterrupted service of the employees, who are represented by Division 998, is necessary to a continuance of the performance of such essential service; and that a strike or work stoppage by said employees would cause an interruption of an essential service.

That the defendants threatened to instigate, induce, conspire with and encourage other persons to engage in a strike which will cause an interruption of an essential service and will continue to do so in violation of Section 111.62 of the Wis. Stats. unless restrained by judgment of this Court.

That said act and doings are in violation of the rights and remedies of the Wisconsin Employment Relations Board and of the rights and remedies of the citizens of the State of Wisconsin and tends to make the judgment which complainant seeks in this action ineffectual.

22 Cover.

23-38 Affidavits of service on defendants.

39

ORDER.

(Venue and Title Omitted.)

Ordered, upon the motion of the court, that a hearing be held before this court, in Branch No. 2 thereof, at the Courthouse, in the city of Milwaukee, Wisconsin, on the 28th day of January, 1949, at 10:00 A. M., to determine whether said defendants, or any of them, are guilty of a violation of the terms and conditions of the injunctive order issued by this court on the 4th day of January, 1949.

Further Ordered, that said defendants appear personally before this Court, at said time and place, and submit to examination with reference to the matters above set forth.

Further Ordered, that a copy of this order be served upon each of the defendants and their counsel and the Attorney General at least ten (10) days prior to the date of said hearing.

Dated this 7th day of January, 1949.

By the Court,

Daniel W. Sullivan,
Circuit Judge.

40 Cover.

41 Stipulation.

AMENDED COMPLAINT.

(Venue and Title Omitted.)

Now comes the Wisconsin Employment Relations Board, the plaintiff above named, by Thomas E. Fairchild, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, who bring this action at the request of the Honorable Oscar Rennebohm, Governor of the State of Wisconsin, and for a cause of action alleges and shows to the court:

1. That, the Wisconsin Employment Relations Board, hereinafter referred to as the board, is, and at all times mentioned herein was, an administrative body created and existing pursuant to Chapter 111 of the Wisconsin Statutes and that L. E. Gooding is the Chairman and J. E. Fitzgibbon and Henry C. Rule are members of said board.

2. That the union, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as Division 998, is an unincorporated voluntary labor organization which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin.

43 3. That the defendants, George Koechel and Charles Brehm, are the president and secretary respectively of said Division 998 and are residents of the City of Milwaukee, Milwaukee County,

Wisconsin; that the defendant, Othmar J. Mischke, is the secretary and treasurer of the International Union with which said Division 998 is affiliated and that said defendant has participated and is participating in conferences held for the purpose of collective bargaining between said Division 998 and the Milwaukee Electric Railway & Transport Company; and that the other defendants above named are members of said Division 998 and of its general executive board and are residents of Milwaukee County, Wisconsin.

4. That the Milwaukee Electric Railway & Transport Company, hereinafter called the company, is a Wisconsin corporation organized and existing pursuant to the provisions of Ch. 180 of the Wisconsin Statutes; that it is engaged in the business of furnishing public passenger transportation in the State of Wisconsin; and that it is a public utility employer within the meaning of sec. 111.51 of the Wisconsin Statutes.

5. That the defendant, Division 998, is the collective bargaining representative of all of the employees of the company in its operating and maintenance departments, comprising approximately 2,700 employees, which departments are engaged in supplying the company's public passenger transportation service.

6. That a contract between Division 998 and the company, covering wages and working conditions of said employees, expired December 31, 1948; that the company and Division 998 have attempted unsuccessfully to negotiate an agreement for the

year 1949; that the company petitioned the board for the appointment of a conciliator pursuant to sec. 111.54 of the Wisconsin Statutes, and that such conciliator was duly appointed.

- 44 7. That on or about January 3, 1949 the membership of Division 998 in a secret referendum voted to authorize its general executive board to call a strike at such time as the board should deem proper; that pursuant to such action of the membership the general executive board fixed the date of a strike of the employees represented by said Division 998 to begin at 4 o'clock A. M. on Wednesday, January 5, 1949; and that the defendants released for publication in newspapers of general circulation in Milwaukee County, Wisconsin, an announcement of said action by the membership and by the general executive board.

8. That by such actions and other conduct the defendants did, during the month of January, 1949, instigate, induce, conspire with and encourage persons employed by the company to engage in a strike and work stoppage; that the company is engaged in rendering an essential service to the public in the State of Wisconsin, and that the continuance and uninterrupted service of the employees who are represented by Division 998 is necessary to a continuance of the performance of such essential service; and that a strike or work stoppage of said employees would cause an interruption of an essential service.

9. That in obedience to a temporary restraining order issued by the Circuit Court of Milwaukee

County, the strike so authorized and directed by the membership and the general executive board of Division 998, was temporarily postponed and abandoned to await the outcome of the action instituted by this complaint.

10. That the defendants threaten to instigate, induce, conspire with and encourage other persons to engage in a strike which will cause interruption of an essential service, and will continue to do so, in violation of sec. 111.62 of the Wisconsin Statutes unless restrained by judgment of this court.

45 11. That your complainant has a responsibility under Sec. 111.63 of the Wisconsin Statutes for enforcement of compliance with the provisions of Sec. 111.62.

12. That the conduct of the defendants in instigating, inducing, conspiring with and encouraging other persons to engage in a strike will work irreparable injury to the complainant and to the citizens of the State of Wisconsin; will put the complainant to the necessity of bringing a multiplicity of suits; and that your complainant has no adequate remedy at law for redress against such conduct.

Wherefore, the complainant demands judgment that the defendants, and each of them, and employees, servants, and agents and members of the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, be perpetually restrained and enjoined from calling a strike, going out on strike, or causing any work stoppage or slowdown which

would cause an interruption of the public passenger service of the Milwaukee Electric Railway & Transport Company, in the State of Wisconsin, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company, and for such other relief as may be appropriate in the premises.

46 Cover.

47 **STATEMENT OF DEFENDANTS.**

(Venue and Title Omitted.)

This statement is made on behalf of the defendants in this action, and in response to the order of this court dated January 7, 1949, directing that a hearing be held to determine whether the defendants, or any of them, are guilty of a violation of the terms and conditions of the injunctive order issued by this court on the 4th day of January, 1949.

The facts immediately preceding and following the issuance of the temporary restraining order were as follows:

About mid-afternoon of Tuesday, January 4, 1949, the Executive Board of Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, pursuant to the directions of the membership of that organization, and after final attempts at settlement of their dispute had failed, set the time for

a strike of its members as of 4:00 A. M., Wednesday, January 5th. This action was reported to the Milwaukee Electric Railway and Transport
48 Company, the employer, and to the press.

The press was also advised by counsel for Division 998 that if a restraining order was issued in proper form by a court of competent jurisdiction, prior to the effective time of the strike, the union would have no choice but to comply with such order and to rescind the strike action.

On the evening of January 4, 1949, starting at about 8:00 P. M., a regular general meeting of the membership of Division 998 was held. At this meeting the reasons for the calling of a strike were explained.

Counsel for the union was present at the meeting and was called upon to advise the members of the probable course of events. He stated that there was a possibility that a temporary restraining order would be served upon the union and its officers some time during that night, and that if that should occur the officers and Executive Board would have to call off the strike. In response to numerous questions about the duties of the membership in that situation, he strongly warned against advisability of individual action, pointed out that concerted action would be in violation of the criminal provisions of the Wisconsin law, and recommended that the members follow the directions and orders of the general Executive Board.

George Koechel, President of the Union, also addressed the meeting and also requested the employees to comply with any order or request of the Executive Board calling off the strike in accordance with any court order that might be served.

The meeting adjourned at about 9:20 P. M.

- 49 Shortly thereafter, after all of the officers and most of the members had left the meeting hall, two Deputy Sheriffs arrived at the hall and stated that they had some papers which were signed by Judge Sullivan and which they were required to serve upon the officers. Upon being advised that no officers were present, the Deputy Sheriffs stated that they would make service at their homes.

At about 10:30 P. M. counsel for the union located President George Koechel and informed him of the fact that a temporary restraining order had been signed by Judge Sullivan and that Deputy Sheriffs were looking for him for service. The Sheriff's Office was then called and was advised where Mr. Koechel could be located, and at about 11:15 P. M. the Deputies arrived and served Mr. Koechel, both as an individual and as President of the union.

The Deputies were advised at that time that in view of the nature of the court order, a meeting of the Executive Board would be called immediately, and that if the Deputies so desired they could remain until the members of the Executive Board arrived and at that time make

service upon those members. The Deputies declined the invitation and said they would continue in their efforts to serve the other defendants at their homes.

Starting at about 11:30 P. M. efforts were made to reach all Executive Board members for a special meeting. By 1:00 A. M., Wednesday, January 5th, most of the Executive Board members appeared for the meeting. At that time the Sheriff's Office was again called and invited to come to the meeting for the purpose of completing service on those who had not yet been served at home. This was done.

50 Starting at 1:30 A. M. on the morning of January 5th, the Executive Board examined and discussed the nature of the order served on them, and their duties under the order. They were again advised by counsel for the union that unless the strike was called off immediately and good faith efforts made to assure continued operation of transit facilities, they would be in contempt of court.

At about 2:00 A. M. Wednesday, January 5th, the Executive Board took official action calling off the strike, and requesting all members to report for work as usual. The exact language was as follows:

"In compliance with the temporary restraining order served on us late tonight, we request all members of Division 998, to report for work at their regular starting time

and to ignore the strike notice issued Tuesday afternoon."

This action was immediately reported to representatives of the press and radio who were awaiting word from the Executive Board and was fully publicized by both press and radio during the following hours. The members of the Executive Board felt that this was as prompt and effective a means of notification available to them in view of the circumstances.

On the morning of Jan. 5th, however, some of the members had not heard that the strike was called off, and did not report at the regular starting time. Of those who did report, some commenced their daily runs, while others refused to do so. Some of those who refused to start work, then prevailed upon others to discontinue and by about 9:00 A. M. all streetcars and buses were back at their terminals.

- 51 Most of that morning (Wednesday, January 5th) President Kocchel was present at a hearing before the Wisconsin Employment Relations Board held at the Milwaukee County Court House for the purpose of determining whether or not a Conciliator should be appointed.

At the conclusion of such hearing, he received full reports from the Executive Board members with respect to the difficulty they met in urging the men to return to work. The Board members were advised to continue their efforts, and in view of reports that many members were doubt-

ing the authenticity of the no-strike order, an official written order was issued by President Koechel. This order read as follows:

“January 5, 1949.

Members: Division #998.

The General Executive Board of Division #998 urgently requests all members who are employed at the Transport Company to return to their jobs **immediately**. This is an official order and **must** be complied with. No one has the authority to advise you otherwise.

This is your obligation to the Court and the public, as well as to your Union.

George Koechel,
President.”

The text of this order was given to all radio stations in the Milwaukee area with the request that as a public service it be announced over
52 their facilities as frequently as possible. Two of the largest radio stations in the Milwaukee area took wire recordings of Mr. Koechel reading the message and broadcast those recordings throughout the afternoon and evening.

In addition, copies of the above order were made on the union's official letterhead and taken by Executive Board members to the various car stations and terminals and posted upon the bulletin boards.

Early in the evening of January 5th, 1949, the union received a telephone call from Professor

Nathan Feinsinger, of the University of Wisconsin Law School, who had been appointed earlier that day by the Wisconsin Employment Relations Board as a Conciliator to attempt settlement of the dispute. Professor Feinsinger offered his services in terminating the work stoppage.

He was advised that, from all information the officers of the union had been able to gather during the course of the day, it appeared that some of the members were insisting that they would not return to work unless the dispute was settled or the Transport Company agreed to voluntary arbitration; and other members were insisting that at the very least a general mass meeting be held the following day for the purpose of discussing the situation and learning the contents of the temporary restraining order and the reason for the action of the Executive Board calling off the strike.

At about 2:00 A. M. Thursday, January 6th, Mr. Koechel was advised by telegram from Professor Feinsinger that Chairman Gooding of the Wisconsin Employment Relations Board was willing to recommend dismissal of the temporary restraining order if that might sufficiently clear the atmosphere and encourage resumption of operations.

- 53 This fact was immediately conveyed to the press and radio, together with another order directing the men to return to work immediately. Copies of the telegram were given to each Executive Board member with directions to proceed

immediately to the car stations and shops and to make its contents known. All members of the Executive Board were directed to continue in their efforts to get the men to return.

President Koechel made a personal appearance at one of the largest car stations where most of the resistance to resuming operations seemed to be centered and succeeded in persuading the employees to report for duty. The other Executive Board members and officers met with similar success, and commencing with the morning of January 6th, 1949, normal operations were resumed.

54 Cover.

55

ANSWER.

(Venue and Title Omitted.)

Now come the above named defendants, by Padway, Goldberg & Previant, their attorneys, and for answer to plaintiff's complaint herein admit, deny and allege as follows:

I.

Admit the allegations of Paragraph 1.

II.

Admit the allegations of Paragraph 2.

III.

Admit the allegations of Paragraph 3.

IV.

Answering the allegations of Paragraph 4, 56 admit that the Milwaukee Electric Railway and Transport Company is a Wisconsin corporation, engaged in the business of furnishing public passenger transportation in the State of Wisconsin, but deny that it is a public utility employer within the meaning of Section 111.51 of the Wisconsin Statutes.

Further answering the allegations of Paragraph 4, defendants allege that the Milwaukee Electric Railway and Transport Company is a Wisconsin corporation which provides, furnishes and sells transportation services to and for residents of the City of Milwaukee and contiguous suburbs and political subdivisions, including thousands of employees of many large industrial and commercial establishments in the City and County of Milwaukee, State of Wisconsin, most of which establishments are engaged in the production of goods for interstate commerce or in interstate commerce, and the services of which employees are essential to such production of goods for interstate commerce; that the rolling stock, equipment and material used by the company are procured in great measure by it from many and diverse points outside the State of Wisconsin, the total value of the rolling stock recently acquired by the company from such points outside the State of Wisconsin, being in excess of the amount of Two Million Dollars (\$2,000,000.00); that the gross operating revenues of the company are in excess of Sixteen Million

Dollars (\$16,000,000.00) annually, and that it transports in excess of one hundred million (100,000,000) passengers annually; that the National Labor Relations Board in December, 1947, pursuant to the terms and provisions of the National Labor Relations Act, and upon the insistence of the company that the terms of such act be complied with, assumed jurisdiction over a controversy respecting the signing of a union security agreement under the provisions of the National Labor Relations Act, conducted an election among the employees of the company represented by the union, and certified that the union had successfully complied with all the provisions of the National Labor Relations Act, and could enter into a union security agreement with the company; that the company is engaged in a business affecting interstate commerce and in interstate commerce, and any interruption in its business as the result of a labor dispute with its employees would affect interstate commerce within the meaning and provisions of the National Labor Relations Act (49 Stats. 449, U. S. Code, Title 29, Paragraph 151-166);

V.

Admit the allegations of Paragraph 5.

VI.

Admit the allegations of Paragraph 6, and further allege as follows:

That in the year 1934 the employees of the Company represented by the Union engaged in

a strike growing out of the refusal of the company to recognize the Union as the exclusive collective bargaining representative of its employees; 58 that upon the termination of such strike the Company and the Union agreed upon a method for the settlement of all future disputes, which method has resulted in fourteen years of uninterrupted service to the public, and which method has always been considered by both parties as adequate for the resolution of all differences which might arise between them; that such method consisted of an agreement between the parties that should any dispute arise during the term of the collective bargaining agreement or over the terms of a new collective bargaining agreement, then such dispute shall be submitted to final and binding arbitration before a tribunal created by mutual consent and choice of both parties; that the Union always has been, and still is, willing to settle the instant controversy with respect to the terms of a new collective bargaining agreement in this manner, just as a similar dispute was settled in connection with the terms and provisions of the 1948 agreement; that it was the unilateral and exclusive action of the company which resulted in the termination of the 1948 agreement, including that part of such agreement which, if not terminated, would have required the parties to arbitrate their differences in the manner aforesaid;

That Division 998 has repeatedly offered during the course of the negotiations with the company to submit the instant dispute to voluntary

arbitration, under the terms of which offer the union would appoint two arbitrators, and the
59 company would appoint two arbitrators; that such arbitrators so appointed would then meet daily for the purpose of selecting a fifth arbitrator or impartial chairman of the Board; that if the parties could not agree upon such fifth arbitrator or chairman of the board, then such fifth arbitrator to be chosen from a list submitted to the parties by the Federal Mediation and Conciliation Service.

Further answering the allegations of Paragraph 6, admit that a Conciliator was appointed by the Wisconsin Employment Relations Board, but deny that the Board had the authority to appoint such Conciliator for the reasons which are hereinafter set forth.

Further answering Paragraph 6, allege that the Union met with the Conciliator, subject to the objections which it had previously made to the jurisdiction of the Board to appoint such Conciliator, and that during the process of conciliation (which terminated on January 29) the Union made numerous offers in an effort to settle the contract, but during the entire conciliation period, the company did not recede from the position which it had originally taken, which led to the appointment of the Conciliator, and that in fact the Company's final offer during the process of conciliation was an offer which was less favorable and desirable to the Union than any offer it had previously made prior to the arbitration;

that the Company did not enter into such conciliation in good faith, nor did it carry on any collective bargaining in good faith during the
60 process of the conciliation; that the Company repeatedly insisted during the course of the conciliation that the only way this matter could be determined would be through a statutory arbitration under the Wisconsin Statutes, refused all offers of voluntary arbitration, and recommendations of the Conciliator, and that the Company is seeking to use the facilities of the Wisconsin Employment Relations Board in this case to obviate its duty to bargain collectively and in good faith; that the Company has requested the Wisconsin Employment Relations Board to seek an injunction in this case for the purpose of preventing the Union from engaging in collective bargaining activities and other activities for the mutual aid and protection of the members of the Union; that on February 9, 1949, the defendants filed a charge with the National Labor Relations Board alleging that the Company had and was continuing to commit unfair labor practices under the provisions of Section 8 (a) (1) and (5) of the National Labor Relations Act by virtue of the conduct immediately above set forth, and that such matter is now pending before the National Labor Relations Board.

VII.

Admit the allegations of Paragraph 7.

VIII.

Deny the allegation in Paragraph 8 that the Company is engaged in rendering an "essential service to the public" in the State of Wisconsin, as such terms are used and contemplated by the 61 Wisconsin Statutes.

IX.

Admit the allegations of Paragraph 9.

X.

Answering the allegations of Paragraph 10 allege that defendants intend to do only that which they may lawfully do.

XI.

Deny the allegations of Paragraph 11.

XII.

Further answering the complaint herein, defendants allege that if the relief prayed for is granted to the complainant, the judgment granting such relief and any statutes upon which such judgment may purportedly be based are null and void, and of no effect whatsoever for the following reasons:

(a) Contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States, in that it is in conflict with the Act of Congress known as the National Labor Relations Act or the Labor Management Rela-

tions Act of 1947 (Public Law 101, 80th Congress, June 23, 1947);

(b) Contrary to the provision of the Thirteenth Amendment to the Constitution of the United States, in that it imposes involuntary servitude upon the union and its members and the defendants herein;

(c) Contrary to the Fourteenth Amendment to the Constitution of the United States, in that it deprives the union and its members, and the defendants herein of their liberty and property without due process of law, and of the equal protection of the laws, and deprives the Union and its members of the right to peacefully assemble, express themselves, and to engage in the basic civil right of collective bargaining and self-organization;

(d) Contrary to Article I, Sections 1, 2, 3, 4, 9 and 12 of the Constitution of the State of Wisconsin, in that it deprives the union and its members of the rights therein provided for;

(e) Contrary to the provisions of Section 133.07, Wisconsin Statutes;

(f) That any Statute upon which such relief could be predicated is an inseparable part of Chapter 414, Wisconsin Laws, 1947, the remaining sections of which are unconstitutional, null, and void, and of no effect whatsoever because:

(1) Contrary to Article IV, Section 1, Article V, Section 1, and Article VII, Section 2, of the Constitution of the State of Wisconsin, in that it

constitutes an unlawful delegation of legislative, executive and judicial powers;

(2) Contrary to Article VII, Section 16, of the Constitution of the State of Wisconsin, in that the legislature has no authority to establish any tribunals of conciliation with the power to render judgment obligatory on the part of the parties unless the parties voluntarily submit their matter in difference to arbitration and agree to abide the judgment or assent thereto in writing;

63 (3) Contrary to Chapter 16, Wisconsin Statutes, 1947, in that the parties which have been and may be appointed by the Wisconsin Employment Relations Board to act as conciliators and arbitrators under the provisions of Chapter 414, Wisconsin Laws, 1947, have been and are so appointed without regard to and in violation of the provisions of said Chapter 16;

(4) Contrary to Article XIII, Section 9, of the Constitution of the State of Wisconsin.

Wherefore, Defendants pray that the complaint herein be dismissed.

Padway, Goldberg & Previant,
Attorneys for Defendants.

64 Verification (omitted).

66

REPLY.

(Venue and Title Omitted.)

The plaintiff, Wisconsin Employment Relations Board, through its attorneys, Thomas E. Fair-

child, Attorney General, Stewart G. Honéck, Deputy Attorney General and Beatrice Lampert, Assistant Attorney General, replying to the answer of the defendants above named denies and alleges as follows:

1. With respect to the allegations of paragraphs IV and XII of said answer, the plaintiff alleges that a suit was heretofore brought by the defendants against the plaintiff, Wisconsin Employment Relations Board, in the Circuit Court for Milwaukee County in the State of Wisconsin, wherein the complaint prayed for a judgment enjoining and restraining this defendant from enforcing any provisions of Ch. 414, Laws of 1947 and for such other relief as the court should deem just, on the grounds that said statutes are invalid and inapplicable to the defendants above named for the reasons alleged in said paragraphs IV and XII of the answer herein; that this defendant duly filed an answer in said action; that thereupon the matter was fully argued and briefed before the court; that on or about the 30th day of December, 67 1948, the court issued its decision against the contentions of the plaintiffs herein on the issues so raised; and that on the 4th day of January, 1949 the court issued and filed its judgment adjudging that the provisions of Ch. 414, Laws of 1947, as contained in sec. 111.50 to 111.65 of the Wisconsin Statutes, to be valid and applicable to the Milwaukee Electric Railway and Transport Company and its employees; that by said judgment the matters and issues raised by paragraphs IV and XII of the defendants' answer herein were

finally adjudicated and settled, and that the defendants are thereby barred from defending this action on said grounds; that the facts and circumstances alleged in this paragraph are a matter of record in the office of the Clerk of the Circuit Court for Milwaukee County in the action entitled Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, George Koechel and Charles Brehm, Plaintiffs, v. The Milwaukee Electric Railway & Transport Company and the Wisconsin Employment Relations Board, Defendants, Case #217-441, to which record reference is hereby made and the same is made a part hereof as if specifically set forth herein.

2. With respect to the allegations contained in paragraph VI of the defendants' answer the plaintiff denies that there is at the present time any agreement between the defendants and the Milwaukee Electric Railway and Transport Company providing for voluntary arbitration of labor disputes; but alleges that whatever agreement there may have been as to such matters has expired and has not been renewed; alleges that the conciliator appointed by the board, Nathan P. Feinsinger, has reported to the board that he has been unable to effectuate a settlement of the labor dispute between the company and the defendants; that said conciliator has reported to the board the negotiations through which he endeavored to effectuate a settlement of the dispute and has not reported a refusal on the part of either party to bargain in good faith; that no

charge of unfair practice or of violation of law has been filed with the board by reason of any refusal on the part of the company to engage in collective bargaining; that the board does not maintain this action at the request of the Milwaukee Electric Railway and Transport Company but that it brought and maintains said action at the request of the governor in the interest and for the benefit of the public generally; that as to the other matters alleged in said paragraph the plaintiff has no information sufficient to form a belief and therefore denies the same; but that as to all of the facts alleged in paragraph VI of the answer the plaintiff alleges that the same are immaterial to this action and have no bearing upon the issues whether an injunction should issue pursuant to sec. 111.63 of the statutes.

**90. STIPULATION TO ADOPT FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
JUDGMENT.**

(Venue and Title Omitted.)

Whereas the original findings of fact, conclusions of law and judgment in the above matter of which the attached is a true and correct copy were duly signed and filed by the Hon. Daniel Sullivan, Judge of the Circuit Court of Milwaukee County, Wisconsin, on the 11th day of April, 1949, and

Whereas said original cannot be found, Now,
Therefore,

It Is Stipulated by and between the parties to the above entitled action by their respective attorneys, that the attached true and correct copy of said findings of fact, conclusions of law and judgment may be substituted and serve for the originals and may be included as such in the record transmitted to the Supreme Court of the State of Wisconsin in the appeal from said judgment.

Dated September 23, 1949.

91 **FINDINGS OF FACT AND CONCLUSIONS
OF LAW.**

(Venue and Title Omitted.)

This action coming on for trial of the issues of law raised by the pleadings, upon plaintiff's motion for judgment on the pleadings, on the 16th day of February, 1949; and Beatrice Lampert, appearing for the plaintiff and David Previant appearing for the defendants, and after hearing the arguments of counsel and being advised in the premises, I hereby make and file the following findings of fact and conclusions of law constituting my decision in said action:

Findings of Fact.

1. That the Wisconsin Employment Relations Board (hereinafter referred to as the board) is and at all times mentioned herein was an administrative body created and existing pursuant to Chapter 111 of the Wisconsin Statutes and that it has responsibility under Sec. 111.63 of the

Wisconsin Statutes for enforcement or compliance with the provisions of Sec. 111.62.

92 2. That the defendant, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998 (hereinafter referred to as Division 998), which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin, is the collective bargaining representative of all employees of the Milwaukee Electric Railway and Transport Company, and that the other named defendants are officers or representatives of said Division 998.

3. That the Milwaukee Electric Railway and Transport Company is engaged in the business of furnishing public passenger transportation service in Milwaukee County, Wisconsin; that it employs approximately 2700 employees for the purpose of carrying out such service, who are represented by Division 998 for purposes of collective bargaining; that it transports in excess of 160,000,000 passengers annually.

4. That on or about January 3, 1949, the membership of Division 998 in a secret referendum voted to authorize its general executive board to call a strike at such time as the board should deem proper; that pursuant to such action of the membership the general executive board fixed the date of the strike of the employees represented by said Division 998 to begin at 4 o'clock A. M. on Wednesday, January 5, 1949; that the defendants released for publication in newspapers of general

circulation in Milwaukee County, Wisconsin, an announcement of said action by the membership and by the general executive board.

5. That in obedience to a temporary restraining order issued by the Circuit Court of Milwaukee County the strike so authorized and directed by the membership and the general executive board of Division 998 was temporarily postponed to
93 await the outcome of the action instituted by this complaint.

6. That the defendants threaten to instigate, induce, conspire with and encourage other persons, more specifically 2700 employees of the Milwaukee Electric Railway and Transport Company, to engage in a strike.

7. That the service of such persons described in the preceding finding are essential to carrying out the operations of said Milwaukee Electric Railway and Transport Company.

8. That the public passenger transportation service furnished by the Milwaukee Electric Railway and Transport Company is furnished wholly by street car and motor bus within Milwaukee County, Wisconsin; that said service furnished to and for residents of the City of Milwaukee and contiguous suburbs is utilized by employees of many establishments engaged in production of goods for interstate commerce; that the equipment utilized by the company in rendering such service is procured in great measure from points outside the State of Wisconsin; that the National Labor Relations Board conducted an election

among employees of the company represented by Division 998 respecting the signing of a union security agreement and certified as a result of said election that Division 998 had complied with the conditions of the National Labor Relations Act so as to remove any obstacles under that act from entering into a union security agreement.

9. That the defendants threaten to instigate, induce, conspire with and encourage other persons, more specifically 2700 employees of the Milwaukee Electric Railway and Transport Company, to engage in a strike which will cause interruption of an essential service.

94 10. That such conduct of the defendants will work irreparable injury to the plaintiff and to the citizens of the State of Wisconsin, will put the plaintiff to the necessity of bringing a multiplicity of suits, and that said plaintiff has no adequate remedy at law for redress against such conduct.

Conclusions of Law.

1. That the Milwaukee Electric Railway and Transport Company is a public utility employer within the meaning of sec. 111.51 (1) of the statutes and that its transportation service rendered within Milwaukee County, Wisconsin, is an essential service within the meaning of sec. 111.51 (2) of the statutes.

2. That the conduct of the defendants which the plaintiff seeks to restrain is not guaranteed by any federal statute.

3. That the Circuit Court for Milwaukee County has jurisdiction over the parties and the subject matter to this proceeding.

4. That judgment should enter granting the perpetual injunction and restraining order prayed by the plaintiff.

Let Judgment be entered accordingly.

Dated April 1, 1949.

95

SUBSTITUTED JUDGMENT.

(Venue and Title Omitted.)

This action coming on for trial before the court of the issues of law raised by the pleadings, upon motion of the plaintiff for judgment on the pleadings, on the 16th day of February, 1949, and Beatrice Lampert appearing for the plaintiff and David Previant appearing for the defendants, and the court having heard the arguments of counsel and being advised in the premises and having heretofore issued its decision, findings of fact, conclusions of law and directions for judgment, Now, Therefore,

It Is Adjudged and Decreed That the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, George Koechel, Charles Brehm, Thomas Murach, Raymond Knutson, Jack Wery, Joe Der-sinzski, Howard Lynch, Herman Weber, Paul Kraft, Steve Malick, William Buche, George Sloan, Edwin Becker and Othmer Mischo, and each of them, and employees, servants, agents

and members of said defendants be perpetually restrained and enjoined from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the passenger service of the Milwaukee Electric Railway and Transport Company in the State of Wisconsin, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company; all subject to Section 111.64, Wisconsin Statutes.

Dated April ..., 1949.

By the Court.

Fred J. Jaeger,

Clerk,

By Harold H. Gruettner,

Deputy Clerk.

- 97 Cover.
- 98 Admission of service by Padway, Goldberg & Previant on notice of entry of findings.
- 99 Notice of entry of findings of fact and conclusions of law.
- 100- Findings of fact and conclusions of law (same
103 as Record 91-94; set forth herein at pp. 61-66).
- 104 Cover.
- 105 Admission of service of judgment and findings by Padway, Goldberg & Previant.

106 **Notice of entry of judgment.**

107- **Judgment** (same as Record 95-96; set forth
108 herein at pp. 155-156).

109 **Cover.**

110 **NOTICE OF APPEAL.**

(Venue and Title Omitted.)

Please Take Notice that the defendants above named hereby appeal to the Supreme Court of the State of Wisconsin from the judgment rendered by the above named court herein entered on the 11th day of April, 1949, in favor of the plaintiff and against the defendants and from the whole thereof.

Dated September 7th, 1949.

111 **WAIVER OF UNDERTAKING.**

(Venue and Title Omitted.)

The undersigned herewith waives the filing and serving of an undertaking for costs on appeal in the above entitled action as required by the Wisconsin Statutes.

Dated September 8, 1949.

112 **Cover.**

113 **Certificate of clerk.**

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[fol. 160] Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Ninth day of August, A. D. 1949.

Present: Hon. Marvin B. Rosenberry, Chief Justice; Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. Henry P. Hughes, Hon. John E. Martin, Hon. Grover L. Broadfoot, Justices.

Be it remembered that heretofore, to-wit: on the thirtieth day of September in the year of our Lord One Thousand Nine Hundred and Forty-nine came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, George Koechel, Charles Brehm, Thomas Murach, Raymond Knutson, Jack V. ry, Joe Dersinzski, Howard Lynch, Herman Weber, Paul Kraft, Steve Malick, William Buche, George Sloan, Edwin Becker and Othmer Mischo, by their attorneys and filed in said Court their certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Milwaukee County, in said State, in words and figures following, that is to say:

[fol. 161] [Stamp:] Filed Sep. 12, 1949. Fred J. Jaeger,
Clerk

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

218-489

WISCONSIN EMPLOYMENT RELATIONS BOARD, Plaintiff,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND
MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, George
Koechel, Charles Brehm, Thomas Murach, Raymond
Knutson, Jack Wery, Joe Dersinzski, Howard Lynch,
Herman Weber, Paul Kraft, Steve Malick, William Buche,
George Sloan, Edwin Becker and Othmer Mischo,
Defendants

NOTICE OF APPEAL

To Thomas E. Fairchild, Esq., Attorney for Plaintiff, and
Fred J. Jaeger, Clerk of the Aforesaid Court:

Please Take Notice that the defendants above named
hereby appeal to the Supreme Court of the State of Wis-
consin from the judgment rendered by the above named
court herein entered on the 11th day of April, 1949, in favor
of the plaintiff and against the defendants and from the
whole thereof.

Dated September 7th, 1949.

Padway, Goldberg & Previant, Attorneys for De-
fendants.

Service of a copy of the within admitted this 8 day of
September, 1949.

Beatrice Lampert, Plaintiff's Attorney.

Service admitted this 12th day of September, 1949.

Fred J. Jaeger, Clerk of Circuit Court, Milwaukee
County, Wis.

Filed Sep. 30, 1949. Arthur A. McLeod, Clerk of Supreme
Court, Madison, Wis.

[fol. 162] [Stamp:] Filed Sep. 12, 1949. Fred J. Jaeger,
Clerk

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

WISCONSIN EMPLOYMENT RELATIONS BOARD, Plaintiff,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND
MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, George
Koechel, Charles Brehm, Thomas Murach, Raynold
Knutson, Jack Wery, Joe Dersinzski, Howard Lynch,
Herman Weber, Paul Kraft, Steve Malik, William Buche,
George Sloan, Edwin Becker and Othmer Mischo,
Defendants

WAIVER OF UNDERTAKING

The undersigned herewith waives the filing and serving
of an undertaking for costs on appeal in the above entitled
action as required by the Wisconsin Statutes.

Dated September 8, 1949.

Thomas E. Fairchild, Attorney General, by Beatrice
Lampert, Assistant Attorney General.

Filed Sep. 30, 1949. Arthur A. McLeod, Clerk of Supreme
Court, Madison, Wis.

[fol. 163] And afterwards to-wit on the 2nd day of May,
A. D. 1950, the same being the 63rd day of said term, the
judgment of this Court was rendered in words and figures
following, that is to say:

MILWAUKEE CIRCUIT COURT

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, George Koechel, Charles Brehm, Thomas Murach, Raymond Knutson, Jack Wery, Joe Dersinzski, Howard Lynch, Herman Weber, Paul Kraft, Steve Malick, William Buche, George Sloan, Edwin Becker and Othmer Mischio, Appellants

Opinion by Justice Broadfoot

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed.

[fol. 164] STATE OF WISCONSIN: IN SUPREME COURT

No. 146

August Term, 1949

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, et al., Appellants

Appeal from a judgment of the circuit court for Milwaukee County: Daniel W. Sullivan, Circuit Judge. Affirmed.

This action was commenced January 4, 1949, by the Wisconsin Employment Relations Board against the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, and certain individual defendants who were officers or members of the

general executive board of said association, to perpetually restrain and enjoin them from calling a strike or causing an interruption of the public passenger service of the Milwaukee Electric Railway and Transport Company in the state of Wisconsin. The pleadings consisted of the plaintiff's complaint and amended complaint the answer of the [fol. 165] defendants, and a reply to the answer by the plaintiff. Plaintiff moved for judgment on the pleadings, and the motion was granted. Defendants appeal from the judgment entered on April 11, 1949, granting the injunction prayed for in the amended complaint.

The findings of fact made and filed are as follows:

"1. That the Wisconsin Employment Relations Board (hereinafter referred to as the board) is and at all times mentioned herein was an administrative body created and existing pursuant to Chapter 111 of the Wisconsin Statutes, and that it has responsibility under sec. 111.63 of the Wisconsin Statutes for enforcement of compliance with the provisions of sec. 111.62.

"2. That the defendant, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998 (hereinafter referred to as Division 998), which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin, is the collective bargaining representative of all employees of the Milwaukee Electric Railway and Transport Company, and that the other named defendants are officers or representatives of said Division 998.

"3. That the Milwaukee Electric Railway and Transport Company is engaged in the business of furnishing public passenger transportation service in Milwaukee County, Wisconsin; that it employs approximately 2700 employees for the purpose of carrying out such service, who are represented by Division 998 for purposes of collective bargaining; that it transports in excess of 100,000,000 passengers annually.

"4. That on or about January 3, 1949, the membership of Division 998 in a secret referendum voted to authorize its general executive board to call a strike at such time as the board should deem proper; that pursuant to such action of the membership the general executive board fixed the date

of the strike of the employees represented by said Division 998 to begin at 4 o'clock A. M. on Wednesday, January 5, 1949; that the defendants released for publication in newspapers of general circulation in Milwaukee County, Wisconsin, an announcement of said action by the membership and by the general executive board.

"5. That in obedience to a temporary restraining order issued by the Circuit Court of Milwaukee County the strike so authorized and directed by the membership and the general executive board of Division 998 was temporarily postponed to await the outcome of the action instituted by [fol. 166] this complaint.

"6. That the defendants threaten to instigate, induce, conspire with and encourage other persons, more specifically, 2700 employees of the Milwaukee Electric Railway and Transport Company, to engage in a strike.

"7. That the service of such persons described in the preceding findings are essential to carrying out the operations of said Milwaukee Electric Railway and Transport Company.

"8. That the public passenger transportation service furnished by the Milwaukee Electric Railway and Transport Company is furnished wholly by street car and motor bus within Milwaukee County, Wisconsin; that said service furnished to and for residents of the City of Milwaukee and contiguous suburbs is utilized by employees of many establishments engaged in production of goods for interstate commerce; that the equipment utilized by the company in rendering such service is procured in great measure from points outside the State of Wisconsin; that the National Labor Relations Board conducted an election among employees of the company represented by Division 998 respecting the signing of a union security agreement and certified as a result of said election that Division 998 had complied with the conditions of the National Labor Relations Act so as to remove any obstacles under that act from entering into a union security agreement.

"9. That the defendants threaten to instigate, induce, conspire with and encourage other persons, more specifically 2700 employees of the Milwaukee Electric Railway and

Transport Company, to engage in a strike which will cause interruption of an essential service.

“10. That such conduct of the defendants will work irreparable injury to the plaintiff and to the citizens of the State of Wisconsin, will put the plaintiff to the necessity of bringing a multiplicity of suits, and that said plaintiff has no adequate remedy at law for redress against such conduct.”

No testimony was taken in the trial court. As there is no challenge of the above findings they will be accepted as the facts and our decision will be based thereon.

[fol. 167] BROADFOOT, J.:

The defendants upon appeal assert that the judgment should be reversed because ch. 414, Laws of 1947, now secs. 111.50 to 111.65, inclusive, Stats., is not applicable to these defendants; that it is unconstitutional and void because it is repugnant to sec. 7 of the National Labor Relations Act as amended, and is therefore contrary to Art. I, sec. 8 and Art. VI of the United States constitution; the law violates the Fourteenth Amendment to the constitution of the United States and secs. 1, 2, 3, 4, and 9 of Art. I of the Wisconsin constitution; the judgment and the statute upon which it is purportedly based violate the Thirteenth Amendment to the constitution in that they impose involuntary servitude; and further, the judgment is invalid because it is based on ch. 414, Laws of 1947, the several sections of which are unconstitutional and are not severable.

Counsel for the defendants ably advance several persuasive arguments in support of each of their contentions. They might be convincing if the rights of the public in the outcome of this litigation were overlooked. The operations of public utilities have long been subject to scrutiny by regulatory bodies set up by the state to protect the rights of the public. Among the details of their operations subject to regulation are the right to engage in or to discontinue operations, the type and amount of service to be rendered, expansion programs, the type and amount of securities to be issued, rates to be charged, accounting [fol. 168] systems and the amount of depreciation permitted to be charged off. In ordinary commercial enterprises these matters are left to management. On the other hand,

utilities are granted certain privileges by law; such as the elimination of most competition and the right of eminent domain. Persons who invest their savings in the securities of a public utility know their capital is subjected to the regulation and control of the state. They must weigh the advantages against the disadvantages in determining in what type of enterprise they will invest. Management and investors alone cannot operate a public utility. There must be natural persons employed to give it life. All are part of one organization which is subject to control by the state. So persons seeking employment must weigh the advantages and disadvantages of employment by public utilities. There are many advantages to this type of employment: There is generally a continuity of employment in the public utility field; the state has not been adamant in refusing higher rates when necessary to improve service and working conditions or to bring wages to a standard comparable to wages in other lines of endeavor; the public, too, has been generous in its acceptance of higher rates when they are necessary to pay utility employees suitable wages; utilities may not cease operations nor lock out employees. It is with this in mind that we approach the questions to be determined.

As to the contention that the law does not apply to the defendant employees, the pertinent portions of sec. 111.51, [fol. 169] Stats. reads as follows:

“111.51 Definitions. When used in this subchapter:

“(1) ‘Public utility employer’ means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state; * * * This subchapter does not apply to railroads nor railroad employees.

“(2) ‘Essential service’ means furnishing water, light, heat, gas electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.”

Webster's New International Dictionary (Second Edition) Unabridged, distinguishes between railroads and railways as follows:

"*Railroads* . . . is usually limited to roads for heavy steam transportation and also to steam roads partially or wholly electrified or roads for heavy traffic designed originally for electric traction. The lighter electric street-car lines and the like are usually termed *railways*."

This is the common and approved usage of the term "rail-road" and it is generally so understood when the term is used. The employer is engaged in public passenger transportation and is clearly covered by the act. It is also engaged in furnishing an essential public service under the definitions contained in the act. The defendants, as employees, are likewise subject to the act.

The second contention, that the law is repugnant to the National Labor Relations Act and is therefore unconstitutional, has been answered in the case of *International Union, Local 232, et al. v. Wisconsin Employment Relations Board et al.* 336 U. S. 245. The decision in that case was filed after the commencement of this action. It was ren- [fol. 170] dered on an appeal from a decision of this court, 250 Wis. 550. In that decision, the United States supreme court announced that neither paragraph 7 nor 13 confers upon employees an absolute right to engage in every kind of strike or other concerted activity. The following quotations are from said decision:

" . . . The latter decisions and our own, *Labor Board v. Fansteel Corp.*, 306 U. S. 240; *Southern S. S. Co. v. Labor Board*, 316 U. S. 31; *Labor Board v. Sands Mfg. Co.* 306 U. S. 332; *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740; and see *Hotel and Restaurant Employees Local v. Wisconsin Employment Relations Board*, 315 U. S. 437, clearly interdict any rule by the Board that every type of concerted activity is beyond the reach of the states' adjudicatory machinery. The bare language of sec. 7 cannot be construed to immunize the conduct forbidden by the judgment below and therefore the injunction as construed by the Wisconsin Supreme Court does not conflict with sec. 7 of the Federal Act."

"Reliance also is placed upon sec. 13 of the Labor Relations Act, which provided, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.' 49 Stat. 449, 457. The 1947 Amendment carries the same provision but that Act in-

cludes a definition. Section 501 (2) says that when used in the Act 'The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or concerted interruption of operation by employees.' 61 Stat. 161.

'This provision, as carried over into the Labor Management Act, does not purport to create, establish or define the right to strike. On its face it is narrower in scope than sec. 7—the latter would be of little significance if 'strike' is a broader term than 'concerted activity.' Unless we read into sec. 13 words which Congress omitted and a sense which Congress showed no intention of including, all that this provision does is to declare a rule of interpretation for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. It did not purport to modify the body of law as to the legality of strikes as it then existed. * * *'

The third contention of the defendants is that the act is in violation of certain constitutional guarantees in that it denies to defendants equal protection of the laws, it [fol. 171] deprives the union and its members of their liberties to contract and of their property without due process of law; that it permits involuntary servitude, denies the union and its members the constitutional right of free speech and the right to assemble to consult for the common good, and to petition the government, and that the statute is so vague and indefinite that its application is in violation of due process of law.

The rights guaranteed by both the federal and state constitutions are individual rights, and they are not absolute. In *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722, 725, it was stated:

'Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of 'liberty,' the question always is whether the state has violated 'the essential attributes of that liberty.' Mr. Chief Justice

Hughes in *Near v. Minnesota*, 283 U. S. 697, 708. While the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies 'to promote the health, safety, morals and general welfare of its people. * * * The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise.' *Ibid* at 707."

The prohibitions of the statute under review are against the actions of more than one individual when acting in concert. We cannot see that any individual rights are infringed upon. If there is such infringement, it must be recognized that it is in recognition of the paramount rights of the public. The United States supreme court recognized this in the case of *International Union, Local 232, et al. v. Wisconsin Employment Relations Board et al.*, *supra*, p. 259, when [fol. 172] it stated:

"* * * This Court less than a decade earlier had stated that law (National Labor Relations Act) to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.' *Dorchy v. Kansas*, 272 U. S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. *Duplex Co. v. Deering*, 254 U. S. 443, 488. This Court has adhered to that view. * * *

Mr. Justice Frankfurter also stated this rule in *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722, 728, as follows:

"* * * We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist.' This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' *Thornhill v. Alabama*, 310 U. S. 88, 103-04."

The contention that the legislation is unconstitutional because it imposes involuntary servitude is answered by the language of the statute itself. Sec. 111.64, Stats. reads as follows:

“Construction. (a) Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike [fol. 173] or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

“(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.”

Instead of being subject to involuntary servitude the employees of public utilities enjoy certain advantages, such as continuity of employment, that were mentioned above.

Since we have held in *United Gas, Coke & Chemical Workers of America, etc. v. Wisconsin Employment Relations Board*, 255 Wis. 154, — N. W. (2d) —, and do now hold the statute to be constitutional, the final contention of the defendants that the several sections thereof are not severable need not be determined.

By the Court—Judgment Affirmed.

[fol. 174] [Stamp:] Filed May 20, 1950. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

IN SUPREME COURT, STATE OF WISCONSIN, AUGUST TERM,
1949

No. 146

WISCONSIN EMPLOYMENT RELATIONS BOARD, Plaintiff and
Respondent,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY
AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998,
George Koechel, Charles Brehm, Thomas Murach, Ray-
mond Knutson, Jack Wery, Joe Dersinzski, Howard
Lynch, Herman Weber, Paul Brehm, Paul Kraft, Steve
Malick, William Buche, George Sloan, Edwin Becker and
Othmar Mischo, Defendants and Appellants

Motion for Rehearing

Now come the Appellants above named, and respectfully
move this Honorable Court to grant a rehearing in the above
entitled case, on the grounds and for the reasons to be
assigned in the printed brief which will be filed in sup-
port hereof.

Dated at Milwaukee, Wisconsin, May 16th, 1950.

Padway, Goldberg & Previant, Attorneys for De-
fendants and Appellants.

Admission of Service

Due and personal service of copy of Motion for Rehear-
ing by Appellants, in the above entitled action, is hereby ad-
mitted this 17 day of May, A. D. 1950

Beatrice Lampert, Attorney for Wisconsin Employ-
ment Relations Board.

[fol. 175] And afterwards to-wit on the 30th day of June,
A. D. 1950, the same being the 81st day of said term, the

motions were denied in words and figures following, that is to say:

Milwaukee Circuit Court

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY
AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998,
et al., Appellants

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY
AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998,
et al., Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al.,
Respondents

The Court being now sufficiently advised of and concerning the motions of the said appellants for a rehearing in these causes, it is now here ordered that said motions, be, and the same are hereby, denied with \$25.00 costs in each case.

[fol. 176] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

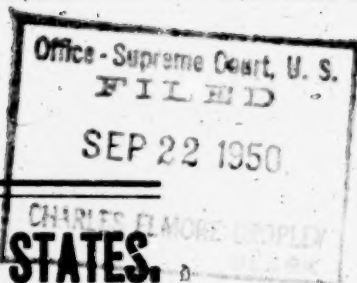
No. 329

ORDER ALLOWING CERTIORARI—Filed November 6, 1950

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 302, St. John et al. vs. Wisconsin Employment Relations Board et al.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ

LIBRARY
SUPREME COURT, U.S.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 329.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,
DIVISION 998, GEORGE KOECHER, CHARLES BREHM,
THOMAS MURACH, RAYMOND KNUTSON, JACK WERY,
JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER,
PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM
BUCHER, GEORGE SLOAN, EDWIN BECKER and
OTHMAR MISCHO,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the
State of Wisconsin.

DAVID PREVIAIT,
511 Warner Theatre Building,
212 West Wisconsin Avenue,
Milwaukee 3, Wisconsin,
Counsel for Petitioners.

ALFRED G. GOLDBERG,
SAUL COOPER,
511 Warner Theatre Building,
212 West Wisconsin Avenue,
Milwaukee 3, Wisconsin,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,
DIVISION 998, GEORGE KOECHEL, CHARLES BREHM,
THOMAS MURACH, RAYMOND KNUTSON, JACK WERY,
JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER,
PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM
BUCHE, GEORGE SLOAN, EDWIN BECKER and
OTHMAR MISCHO,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the
State of Wisconsin.

To the Honorable, the Justices of the Supreme Court of
the United States:

The above named petitioners respectfully pray that a
Writ of Certiorari issue to review the decision of the
Supreme Court of Wisconsin entered in the above entitled
case on May 2, 1950, motion for rehearing denied June 30,
1950.

OPINIONS BELOW.

The opinion of the Circuit Court for Milwaukee County (R. 101-118) is unreported. The opinion of the Wisconsin Supreme Court (R. 163-171) is reported in 257 Wis. 43, 42 N. W. (2) 471.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

In this case the validity of certain statutes of the State of Wisconsin, to-wit: Sections 111.50-111.65, particularly Section 111.62 thereof, and a judgment based on such statutes, is drawn in question upon the ground that such statutes and judgment, on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to:

(a) Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the Labor Management Relations Act, 61 Stats. 136; 29 U. S. C., Sections 141-197;

(b) Section 1 of the Thirteenth Amendment to the Constitution of the United States in that they impose involuntary servitude; and

(c) Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprive petitioners of liberty and property without due process of law, and deprive petitioners of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all causes in the State of Wisconsin, was in favor of the validity of the statutes and judgment.

Petitioners argued before the Circuit Court of Milwaukee County (see answer, Paragraph XII, R. 145), and before the Supreme Court of the State of Wisconsin (see decision, R. 168, 169, 171), that Sections 111.50-111.65 of the Wisconsin Statutes, and more particularly Section 111.62, as construed, were unconstitutional and void and of no effect whatsoever because they were repugnant to the provisions of the United States Constitution referred to immediately hereinabove. The federal question of whether the Wisconsin statutes in question, and the judgment purportedly based on such statutes, violated the Constitution of the United States was raised therefore before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin specifically held that neither the statutes nor the judgment based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the Constitution of the United States. The Court stated:

“The second contention, that the law is repugnant to the National Labor Relations Act and is therefore unconstitutional, has been answered in the case of **International Union, Local 232, et al., v. Wisconsin Employment Relations Board et al.**, 336 U. S. 245” (R. 168).

Answering the contention that the statutes and judgment violated rights under the Fourteenth Amendment, the Court stated:

“The prohibitions of the statute under review are against the actions of more than one individual when acting in concert. We cannot see that any individual rights are infringed upon. If there is such infringement, it must be recognized that it is in recognition of the paramount rights of the public. The United States Supreme Court recognized this in the case of

International Union, Local 232, et al., v. Wisconsin Employment Relations Board et al., supra, page 259, when it stated: * * * (R. 170).

In answering the contention that the statutes and judgment were in violation of the Thirteenth Amendment the Court stated:

“Instead of being subject to involuntary servitude the employees of public utilities enjoy certain advantages, such as continuity of employment, that were mentioned above” (R. 171).

Thus the Wisconsin Supreme Court has held that the taking of a strike vote, the announcement of intention to strike, and the strike itself are in violation of the Wisconsin Statutes, subject to restraint by the Wisconsin Courts, and that such restraint is not in violation of any provision of the Constitution of the United States.

A copy of the entire record in this case as certified to be true and correct by the Clerk of the Wisconsin Supreme Court is hereby furnished and made a part of this application in compliance with Rule 38, Paragraph 1, of the Rules of this Court.

QUESTION PRESENTED.

Whether a state may, by statute and injunction, prohibit strikes by employees of “public utility” employers when such strikes will result in an interruption of “essential service.”

STATE AND FEDERAL STATUTES INVOLVED.

The pertinent state statutory provisions have been printed in the Appendix to the Petition for Writ of Certiorari in the case of **Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al., Petitioners, v. Wisconsin Employment Relations Board et al., Respondents**, Case No. , a companion case to this one.

Particularly pertinent herein are Sections 111.62 and 111.63 which read as follows:

"111.62. Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty. It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor."

"111.63 Enforcement. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which

any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply."

Section 7 of the National Labor Relations Act (29 U. S. C., Section 157) reads as follows:

"Sec. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 13 of the National Labor Relations Act (29 U. S. C., Section 163) reads as follows:

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT.

The petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the Union or Division 998, is an unincorporated, voluntary, labor organization. It is the collective bargaining representative of all of the employees of the Milwaukee Electric Railway and Transport Company, hereinafter referred to as the em-

ployer, in its operating and maintenance departments. These departments employ approximately 2700 employees, who are engaged in supplying the employer's public passenger transportation service (R. 152). The individual petitioners are officers and members of the union who were sued in both capacities (R. 152).

The employer is engaged in the business of furnishing public passenger transportation service by streetcar and motor bus in the City of Milwaukee and its contiguous area, including service to thousands of employees of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce or in interstate commerce (R. 153). The rolling stock, equipment, and material used by the employer is procured in great measure from points outside the State of Wisconsin, the total value of the rolling stock recently acquired being in excess of \$2,000,000 (R. 140, 153). Its gross operating revenue exceeds \$16,000,000 annually and it transports in excess of 100,000,000 passengers annually (R. 141, 152). Any substantial interruption of the business of the employer as a result of a labor dispute would affect interstate commerce (R. 141, 152-154).

The respondent, Wisconsin Employment Relations Board, is an administrative body in which is vested by statute the responsibility of enforcing the provisions of the statute herein involved (R. 128, 151).

The National Labor Relations Board in December, 1947, upon the insistence of the employer that the terms of the National Labor Relations Act be complied with, assumed jurisdiction over the labor relations of the employer, conducted an election among its employees represented by Division 998, and certified that Division 998 was authorized to enter into a "union security" agreement with the employer pursuant to Sections 8 (a) 3 and 9 (e) of the Labor Management Relations Act (R. 141, 153-154).

A contract between Division 998 and the employer covering wages and working conditions of the employees represented by Division 998 expired December 31, 1948 (R. 129, 144). This contract provided, among other things, that should any dispute arise during the terms of the agreement, or over the terms of a new collective bargaining agreement, such dispute would be submitted to final and binding arbitration before a tribunal created by mutual consent and choice of the parties (R. 142). Division 998 offered to settle the controversy relating to the terms of a new agreement by submitting the same to a voluntary arbitration tribunal as aforesaid, but, despite such offer, the contract providing for voluntary arbitration was unilaterally terminated by the employer (R. 142).

Because of the failure of the parties to come to an agreement, and on or about January 3, 1949, the membership of Division 998, by secret ballot, voted to authorize its executive board to call a strike at such time as the board deemed proper. The executive board fixed the date of the strike for 4 o'clock A. M., Wednesday, January 5, 1949, and released an announcement to that effect to the newspapers (R. 130, 152).

The respondent Board immediately thereafter commenced the action which is the subject of these proceedings, alleging in its complaint that the petitioners did instigate, induce, conspire with and encourage persons employed by the employer to engage in a strike and work stoppage which would cause an interruption of an essential service, and that petitioners threatened to and would continue so to do in violation of Section 111.62, Wisconsin Statutes, unless restrained by the court (R. 120-124). The Circuit Court of Milwaukee County issued a temporary restraining order prior to the effective time of the strike (R. 119). Petitioners complied with the order (R. 132).

Petitioners thereafter filed their answer, in which they alleged, among other things, that any judgment granting the relief prayed for in the complaint, and the statutes upon which such a judgment might purportedly be based, would be null and void because contrary to provisions of the United States Constitution and the Constitution of the State of Wisconsin (R. 139-145).

Prior to the filing of such answer, and trial of the case, the following events took place:

A petition for the appointment of a conciliator, pursuant to Section 111.54, Wisconsin Statutes, was filed by the employer, and a conciliator was appointed (R. 143). Division 998 and the employer met with the conciliator, but the employer's final offer during the process of conciliation was less favorable to the union than any offer it had made previous to conciliation (R. 143).

During the process of conciliation, the employer insisted that the matter could only be determined by statutory arbitration, as provided in subchapter 3 of Chapter 111, Wisconsin Statutes, and refused all offers of voluntary arbitration and recommendations of the conciliator (R. 144).

On February 9, 1949, Division 998 filed a charge with the National Labor Relations Board alleging that the employer had committed and was continuing to commit unfair labor practices by failing to bargain in good faith under the provisions of Sections 8 (a) (1) and (5) of the National Labor Relations Act, as amended, because of its conduct as immediately hereinabove set forth. Such charges are now pending before the National Labor Relations Board (R. 144).

When the action came on for trial of the issues, respondent moved for judgment on the pleadings (R. 151, 155).

The Circuit Court entered the judgment as prayed for, perpetually enjoining the petitioners (including the members of petitioning union) from “* * * calling a strike, going out on strike or causing any work stoppage which would cause an interruption of the passenger service of the Milwaukee Electric Railway and Transport Company in the State of Wisconsin, and from instigating, inducing, conspiring with, or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company; all subject to Section 111.64, Wisconsin Statutes” (R. 155-156).

On appeal to the Wisconsin Supreme Court, judgment was affirmed (R. 171). Rehearing was denied (R. 173).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of the State of Wisconsin erred:

1. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in conflict with Sections 7 and 13 (29 U. S. C., Secs. 157 and 163) of the National Labor Relations Act, and, therefore, not in violation of Article I, Section 8, and Article VI of the Constitution of the United States.
2. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in violation of the Fourteenth Amendment to the Constitution of the United States.
3. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in violation of the Thirteenth Amendment to the Constitution of the United States.
4. In affirming the judgment of the Circuit Court of Milwaukee County directing the entry of a permanent injunction.

REASONS FOR GRANTING THE WRIT.

Petitioners pray that the Writ be granted for the following reasons:

I.

The Statutes and Injunction Are in Conflict With Sections 7 and 13 of the National Labor Relations Act, and, Therefore, in Contravention of Article I, Section 8, and Article VI of the Constitution of the United States.

The employment relationship herein involved comes within the terms of the National Labor Relations Act and within the jurisdiction of the National Labor Relations Board under the admitted and undisputed facts (R. 140-141, 152-154). **National Labor Relations Board v. Baltimore Transit Company**, 140 F. 2d 51 (C. A. 4, 1944), cert. den., 321 U. S. 796.

At the employer's insistence, the jurisdiction of the National Board was actually invoked and exercised about one year before the present dispute arose (R. 141, 153-154). There is now pending before the National Labor Relations Board a charge filed by petitioners against the employer based upon the instant controversy (R. 144). The respondent and the state courts properly assumed that the National Labor Relations Act would ordinarily apply, but rested their position on what they considered to be the lack of conflict between the state and federal laws as well as the state's superior power in a dispute of this type.

This case thus presents the question of whether the state action "impairs, dilutes, qualifies or in any way subtracts from any of the rights guaranteed and protected by the federal Act" (**Allen Bradley, Local Union 1111, Etc., v. Wisconsin Employment Relations Board**, 315 U. S. 740,

750), or "stands, as an obstacle to the accomplishment and execution of the full purposes and objects of collective bargaining" (**Hill v. Florida**, 325 U. S. 538, 542), or "whether Congress occupied this field and closed it to state regulation" (**International Union of United Automobile, Aircraft and Agricultural Workers of America, C. I. O., Etc., et al. v. O'Brien**, case No. 456, October Term, 1949). See also **Plankinton Packing Company v. Wisconsin Employment Relations Board**, 338 U. S. 953; **LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board**, 336 U. S. 18; **Bethlehem Steel Company v. New York State Labor Relations Board**, 330 U. S. 767.

From the statement of facts, the literal language of the statute, and the judgment and the decision of the Wisconsin Supreme Court, it is apparent that the Wisconsin law, as construed by the Wisconsin Supreme Court, imposes a previous restraint, absolute in character and unlimited in duration, upon the exercise by employees of "concerted activities" for the purpose of collective bargaining. For example: A vote by union members upon a minimum standard of wages and working conditions for which they will not work is in effect an "agreement" to strike, which would encourage employees to quit in concert if such minimum standards were not met. The advocacy at a union meeting (as here) of the adoption of a resolution to strike would be an inducement or encouragement to strike. And, of course, the actual concerted quitting is made a violation. All these acts are punishable as misdemeanors by the Wisconsin Statute.

The Wisconsin law makes the strike in itself an unlawful act. It thus applies, in substance, the conspiracy doctrine to the strike; it makes unlawful the agreement, or advocacy of action when done by two or more in concert, although the action would be lawful if done by any one of them alone.

This legislative abrogation of the right to strike is absolute, without regard to the reasons for, or the ends sought by, the concerted activity, and without regard for the fact that in every other respect the strike is accompanied by perfect obedience to law.

This prohibition on the right to strike does violence to the entire concept of the collective bargaining process which, realistically, is the process by which employees through self-organization, although under considerable economic compulsion to continue to work, are able to deal on terms approaching equality with the employer for the aggregate of the employees' services because of the employees' legal right and actual ability to quit work in concert.

Obviously, if the employees are not legally free to quit in concert, or to agree among themselves upon minimum conditions which they will accept for continued service, or to advocate concerted quitting in a union meeting, or to notify the employer of their decision, such employees are not in a position to bargain for their aggregate services.

One cannot bargain for that which he does not have the legal power to withhold.

Accordingly, the conflict between the state and federal statutes which petitioners herein assert arises out of the alleged right of the state to impose criminal penalties and to restrain, by permanent injunction, the calling of a strike, going out on a strike, and peaceful strike activities for improved wages, hours, and working conditions, absent a contractual obligation not to strike, as contrasted with the federal statutes which, under the same circumstances, impose no such absolute prohibition on the right to strike but, on the contrary, firmly protect engaging in concerted activities for the purpose of collective bargaining or other

mutual aid and protection. **National Labor Relations Board v. Mackay Radio and Telegraph Co.**, 304 U. S. 333, 345-348; **National Labor Relations Board v. Fansteel Corp.**, 306 U. S. 240, 256.

The recent decision of this Court in the case of **International Union, etc., v. O'Brien** (Case No. 456, October Term, 1949), is completely determinative of the issue. In that case a state law requiring majority approval of a strike in a secret ballot vote conducted by the state, as applied to a manufacturing concern subject to the federal law, was held irreconcilable with the federal law which contained no such limitations, express or implied.

This Court pointed out that in the federal Act "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." It was also there held, particularly in the light of Congressional reports and debates, that none of the provisions of the National Labor Relations Act "can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."

Significantly, in the **O'Brien** case, supra, this Court rejected Michigan's reliance on the case of **International Union, United Automobile Workers of America, A. F. of L., Local 232, et al. v. Wisconsin Employment Relations Board**, 336 U. S. 245, a case also principally relied on by the Wisconsin Court in the instant case. In distinguishing the earlier Wisconsin case this Court emphasized that its decision there rested upon the "coercive" nature of the activities involved, and "was not concerned with the traditional peaceful strike for higher wages."

In marked contrast to this Court's reading of its decision in the **International Union, Local 232**, case, supra,

the Wisconsin Court apparently construed such case as placing within the power of the state the exclusive authority to determine what kinds of strike may be permitted, and what kind of strikes may be prohibited. The **O'Brien** case, *supra*, is directly contrary to the Wisconsin Court's interpretation.

Of further significance is the fact that the decision of the Wisconsin Supreme Court has completely overlooked the statement by the majority of this Court in the case of **International Union, Local 232, vs. Wisconsin Employment Relations Board et al.**, *supra*, that "no longer can any state, as to relations within reach of the act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert."

Section 111.62 does expressly make concerted activities, otherwise lawful, a criminal conspiracy and punishable as such.

The Wisconsin Court apparently also felt that it was proper for the state to consider the nature of the industry involved, and, upon determining that strikes in certain industries were more inimical to the welfare of the people of the state than were strikes in other industries, single out those industries for its own independent regulation of the labor management relationship. In this it committed its basic error.

The National Labor Relations Board never considered that the federal act, before its amendment, permitted of any distinction between private industries and public utilities, particularly with respect to the right to strike. It early held that "neither in that Section (Section 13) nor in any other does the Act distinguish between public utility employees and those otherwise employed." In the

Matter of El Paso Electric Company, 13 N. L. R. B. 213, 240.

Nor did the proponents of the 1947 amendments to the Act have any intention of excluding from its protection the employees of public utilities. This is conclusively demonstrated by the following statements made by Senator Taft, the co-author of the amending bill, and its manager on the floor of the Senate, when presenting the majority report of the Senate Committee on Labor and Public Welfare (93 Cong. Rec., 3835 [1947]):

“Basically, I feel that the Committee feels, almost unanimously that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. * * *

“We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come I do not see how in the end we can escape a collective economy. * * *

“It is suggested that we might do so in the case of public utilities, and I suppose that the argument is stronger there, because we fix the rate of public utilities, and we might, I suppose, fix the wages of public

utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that is necessary to do is to forbid strikes, fix wages and compel men to continue working, without consideration of the human and constitutional problems involved in that process."

"If we begin with public utilities it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the Bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation."

Thus, both the National Labor Relations Board, under the early Act, and the sponsors and authors of the amended Act felt that basic to the purposes to be accomplished by the Act was the protection of the right to strike in aid of collective bargaining and other mutual aid and assistance even though the exercise of such right in some circumstances may involve inconvenience and hardship to the public.

The only limitations imposed upon such right by the Congress were:

1. The requirement of a sixty (60) day notice when a contract was in effect [Section 8 (d)].

2. Prohibition of certain types of strikes which were for the purpose of accomplishing objectives which were considered to be against public policy [Section 8 (b) (4)].

3. Temporary delay of strikes which the President of the United States believes may imperil the national health or safety (Section 206-210).

In view of these specific exclusions from the general policy of the law, and in light of the legislative history with respect to attempts to prohibit strikes and to require compulsory arbitration in public utilities, it is clear that state action in the instant type of situation is absolutely precluded.

It is also clear that if a threatened strike in a public utility in any city or state should create a condition which falls within Section 206-210, such controls as the Congress has described would be proper and permissible and would thus afford a remedy to the state. For example: if, in a large metropolitan and industrial community such as Milwaukee County, a threatened strike of the employees of the company furnishing electric power to the area would so seriously affect the normal commercial, and industrial life of the area so as to have wide-spread repercussions, the President of the United States has the authority to intercede. It is not likely that such intercession will be withheld merely because the immediate incidence of the dispute falls most heavily on a particular local area. In our highly integrated and complicated economy any serious economic disruption, or danger to health and morals, in a local area could very well rise to the rank of national emergency. On the other hand, if the community affected were a small one, with little commercial or industrial activity, then either the hardships or inconveniences which might arise are subordinated to the national policy of encouragement and implementation of collective bargaining, or, what is more likely, the employment relationship involved will be one which does not come within the scope of the National Labor Relations Act.

In only one instance has the Congress permitted states to adopt a policy with respect to labor management relations inconsistent with that of its general policy. It did so with respect to the "union shop" by permitting the imposition by the states of greater restrictions on contracts requiring union membership as a condition of employment [Section 14 (b)]. This selective treatment demonstrates that Congress was not unaware of state problems when it enacted the law, and further demonstrates that where Congress felt that greater latitude should be granted to the states, it did so directly and expressly.

Even when there is no conflict between state and federal law, the state can acquire jurisdiction only if it is expressly ceded by the National Labor Relations Board, and then only in a certain type of industry, predominantly local in character [Section 10 (a)].

Had Congress intended that states could, separately and more restrictively, handle problems which arise in public utilities or other essential industries which are subject to the coverage of the federal law, it would have so done. The history of the legislation and the congressional debates indicate both its awareness of the problem and the reasons why it did not do so.

II.

The Wisconsin Law Is in Violation of the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States is violated by the statute and judgment in a number of respects:

(a) The Wisconsin law violates the equal protection clause of the Fourteenth Amendment, since it excludes

from coverage railroads and railroad employees. It thus arbitrarily declares that not all essential service or employers and employees engaged in all essential service are subject to its regulation. Since the law does not distinguish between interstate and intrastate carriers, the classification cannot be justified on the ground that superior federal regulation embraced by the Federal Railway Labor Act fills the gap.

(b) The Wisconsin law deprives working men of their liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The liberty which is embraced in that amendment is a civil liberty of which persons may not be deprived without due process of law. **Allgeyer v. State of Louisiana**, 165 U. S. 578; **Grosjean v. American Press Company**, 297 U. S. 233. The right to work is such liberty. **Truax v. Raich**, 239 U. S. 33, 41.

In **Wolf Packing Company v. Court of Industrial Relations**, 267 U. S. 552, this Court rejected, as invalid under the Fourteenth Amendment, a state statute which prohibited employees from inducing others to quit, or combine to do so, in certain designated industries which the state felt vitally affected the health and welfare of its citizens. The Court quoted its earlier decision, 262 U. S. 522, to the effect that the Act curtailed the right of the employee "to contract about his affairs. This is part of the liberty⁴ of the individual protected by the guarantee of the due process clause of the Fourteenth Amendment."

Prohibitions on the right to strike have been held to violate the Fourteenth Amendment in **Alabama Federation of Labor v. McAdory**, 18 So. (2) 810 (Ala.); **American Federation of Labor v. Bain**, 106 P. (2d) 544 (Oregon); and **Stapleton v. Mitchell**, 60 F. Supp. 51 (D. Kansas).

Finally, the law, as specifically applied and interpreted under the facts of this case, imposes an absolute, previous restraint on petitioners' rights of free speech and assembly in a situation where neither improper means nor improper objectives were involved. **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106; **American Federation of Labor v. Swing**, 312 U. S. 321; **Thomas v. Collins**, 323 U. S. 516.

(c) Section 111.62 of the Wisconsin Statutes further violates the due process clause of the Fourteenth Amendment, because it is indefinite and vague and requires working men to speculate on what acts will result in penal sanction. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. **United States v. Brewer**, 139 U. S. 278; **Weeds v. United States**, 255 U. S. 109; **United States v. L. Cohen Grocery**, 255 U. S. 81; **Connaly v. General Construction Company**, 269 U. S. 385.

The Wisconsin law fails to meet this test in a number of respects, but principally because whether or not the contemplated action of the employees will cause an "interruption" within the meaning of the Act is not always ascertainable. Not all strikes or work stoppages might cause such an interruption. Whether a particular strike may cause such interruption will be dependent upon the ease of replacement of striking employees, the nature of the work performed by such employees, and the number of employees who might respond to the strike call.

The Wisconsin law, in Section 111.54, imposes the duty upon the Wisconsin Employment Relations Board to determine in the first instance whether or not a failure to settle the dispute will cause or is likely to cause the interruption of essential service.

We thus have the peculiar situation that working men are required, before they engage in any concerted activities by way of strike, work stoppage or slowdown, to determine whether or not such activities would cause an interruption of an essential service, while, at the same time, the Legislature has recognized that not all of such activities would cause an interruption, and has placed within the jurisdiction of an administrative agency the power, as well as the duty, to determine whether in a particular case or under particular circumstances there would be such an interruption.

III.

The Wisconsin Statutes and the Judgment Are in Violation of the Thirteenth Amendment to the Constitution in That They Impose Involuntary Servitude.

The Thirteenth Amendment to the Constitution of the United States embraces compulsory service "of whatever name and form and all its badges and incidences." **Bailey v. Alabama**, 219 U. S. 219, 241. It comprehends the "maintenance of a system of completely free and voluntary labor throughout the United States." **Pollock v. Williams**, 322 U. S. 4, 17.

In the case of **International Union, Etc., v. Wisconsin Employment Relations Board**, 336 U. S. 245, the case principally relied upon by the Wisconsin Court in this case, the majority opinion of this Court rejected the involuntary servitude argument therein made with respect to an injunction, but pointed out that

"Nothing in the Statute or the order makes it a crime to abandon work individually (compare **Pollock v. Williams**, 22 U. S. 4, 88 L. Ed. 1095, 64 S. Ct. 792) or collectively." (Emphasis ours.)

But Section 111.62 does make it a crime to abandon work collectively and the judgment of the Wisconsin Courts enjoins the commission of that offense.

CONCLUSION.

Some eleven states have now adopted,¹ in one form or another, laws which provide for compulsory arbitration or government seizure, and which prohibit the right to strike in certain industries over which the National Labor Relations Board has jurisdiction and has asserted jurisdiction. In such states a great number of employees, although assured by congressional action of their right to strike for improved wages, hours and working conditions, and although assured by congressional action of the right to bargain collectively for their mutual aid and protection, find that both the right to strike and the right to bargain collectively in its true sense have been denied to them.

In all of such states a large number of employees find that any action to improve their working status has been denied the protection of the Thirteenth and Fourteenth Amendments to the Constitution of the United States, subject only to a highly theoretical right to quit work as individuals.

This case, therefore, is one of profound importance, not only to those employees, employers and public officials in the states which have passed, or are contemplating

¹ Florida Laws (1947), Chapter 23,911; Indiana Act (1947), Chapter 341; Kansas, General Statutes (1935), Chapter 44, Article 6; Massachusetts, Annotated Laws (1947), Chapter 150 B; Michigan Statutes Annotated (1947), Section 17,454; Nebraska Laws (1947), Chapter 178; New Jersey Laws (1947), Chapter 75; North Dakota Revised Code, Para. 37-0106; Pennsylvania Laws (1947), No. 485; Virginia Acts (1947), Chapter 9; Wisconsin Laws (1947), Chapter 414.

For brief summary and observations on these laws see Roberts, Compulsory Arbitration of Labor Disputes in Public Utilities, 1 Labor Law Journal (C. C. H.) 694 (June, 1950).

passage of, similar legislation, but also to the citizens of this country generally.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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ALFRED G. GOLDBERG,

SAUL COOPER,

Of Counsel.

**BRIEF
for the
PETITION-
ERS**

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SUPREME COURT, U.S.

No. 329.

Office Supreme Court, U. S.

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DEC 27 1950

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,
DIVISION 998, GEORGE KOECHEL, CHARLES BREHM,
THOMAS MURACH, RAYMOND KNUTSON, JACK WERY,
JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER,
PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM
BUCHE, GEORGE SLOAN, EDWIN BECKER and
OTHMAR MISCHO,**
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

**On Writ of Certiorari to the Supreme Court
of the State of Wisconsin.**

BRIEF FOR THE PETITIONERS.

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No. 329.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,
DIVISION 998, GEORGE KOECHÉL, CHARLES BREHM,
THOMAS MURACH, RAYMOND KNUTSON, JACK WERY,
JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER,
PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM
BUCHÉ, GEORGE SLOAN, EDWIN BECKER and
OTHMAR MISCHO,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Wisconsin.

BRIEF FOR THE PETITIONERS.

This action was commenced by the filing of a complaint in the Circuit Court for Milwaukee County by the respondent Wisconsin Employment Relations Board, it being alleged that petitioners instigated, induced, conspired with, and encouraged employees of a public utility

employer to engage in a strike in violation of Wisconsin Statutes (R. 120-124). An *ex parte* temporary restraining order was issued (R. 119) which later was made permanent (R. 155-156). On appeal to the Wisconsin Supreme Court the injunction was affirmed (R. 163). Motion for rehearing was denied (R. 173).

OPINIONS BELOW

The opinion of the Circuit Court for Milwaukee County (R. 101-118) is unreported. The opinion of the Wisconsin Supreme Court (R. 163-171) is reported in 257 Wis. 43, 42 N. W. (2) 471.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

In this case the validity of certain statutes of the State of Wisconsin, to-wit: Sections 111.50-111.65, particularly Section 111.62 thereof, and a judgment based on such statutes, are drawn in question upon the ground that such statutes and judgment, on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to:

(a) Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the Labor Management Relations Act, 61 Stat. 136, 29 U. S. C. Supp., Sections 141-197;

(b) Section 1 of the Thirteenth Amendment to the Constitution of the United States in that they impose involuntary servitude; and

(c) Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprive petitioners of liberty and property without due process of law, and deprive petitioners of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all causes in the State of Wisconsin, was in favor of the validity of the statutes and judgment.

Petitioners argued before the Circuit Court of Milwaukee County (see answer, Paragraph XII, R. 145), and before the Supreme Court of the State of Wisconsin (see decision, R. 168, 169, 171), that Sections 111.50-111.65 of the Wisconsin Statutes, and more particularly Section 111.62, as construed, were unconstitutional and void and of no effect whatsoever, because they were repugnant to the provisions of the United States Constitution referred to immediately above. The federal question of whether the Wisconsin statutes in question, and the judgment purportedly based on such statutes, violated the Constitution of the United States was raised therefore before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin specifically held that neither the statutes nor the judgment based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the Constitution of the United States. The Court stated:

“The second contention, that the law is repugnant to the National Labor Relations Act and is therefore unconstitutional, has been answered in the case of **International Union, Local 232, et al., v. Wisconsin Employment Relations Board et al.**, 336 U. S. 245” (R. 168).

Answering the contention that the statutes and judgment violated rights under the Fourteenth Amendment, the Court stated:

“The prohibitions of the statute under review are against the actions of more than one individual when acting in concert. We cannot see that any individual rights are infringed upon: If there is such infringement, it must be recognized that it is in recognition of the paramount rights of the public. The United States Supreme Court recognized this in the case of **International Union, Local 232, et al., v. Wisconsin Employment Relations Board et al.**, supra, page 259, when it stated: * * *” (R. 170).

In answering the contention that the statutes and judgment were in violation of the Thirteenth Amendment, the Court stated:

“Instead of being subject to involuntary servitude the employees of public utilities enjoy certain advantages, such as continuity of employment, that were mentioned above” (R. 171).

Thus the Wisconsin Supreme Court has held that the taking of a strike vote, the announcement of intention to strike, and the strike itself, are in violation of the Wisconsin Statutes, subject to restraint by the Wisconsin Courts, and that such restraint is not in violation of any provision of the Constitution of the United States.

QUESTION PRESENTED

Whether a state may, by statute and injunction, prohibit strikes by employees of “public utility” employers when such strikes will result in an “interruption of an essential service.”

STATE AND FEDERAL STATUTES INVOLVED

The pertinent state statutory provisions have been printed in the Appendix to the Petitioners' Brief in the case of **Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al., Petitioners, v. Wisconsin Employment Relations Board et al., Respondents**, Case No. 330, October Term, 1950, a companion case to this one.

Particularly relevant herein are Sections 111.62 and 111.63 which read as follows:

"111.62. Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty. It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor."

"111.63 Enforcement. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which

any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply."

Section 7 of the National Labor Relations Act (29 U. S. C. Supp., ¶ 147) reads as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 13 of the National Labor Relations Act (29 U. S. C., Section 163) reads as follows:

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT

The petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the Union or Division 998, is an unincorporated, voluntary, labor organization. It is the collective bargaining representative of all of the employees of the Milwaukee Electric Railway and Transport Company, hereinafter referred to as the employer, in its operating and maintenance departments. These departments employ approximately 2700 employees, who are engaged in supplying the employer's public passenger transportation service (R. 152). The individual petitioners are officers and members of the union who were sued in both capacities (R. 152).

The employer is engaged in the business of furnishing public passenger transportation service by streetcar and motor bus in the City of Milwaukee and its contiguous area, including service to thousands of employees of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce or in interstate commerce (R. 153). The rolling stock, equipment, and material used by the employer is procured in great measure from points outside the State of Wisconsin, the total value of the rolling stock recently acquired being in excess of \$2,000,000 (R. 140, 153). Its gross operating revenue exceeds \$16,000,000 annually and it transports in excess of 100,000,000 passengers annually (R. 141, 152). Any substantial interruption of the business of the employer as a result of a labor dispute would affect interstate commerce (R. 141, 152-154).

The respondent, Wisconsin Employment Relations Board, is an administrative body in which is vested by statute the responsibility of enforcing the provisions of the statute herein involved (R. 128, 151).

The National Labor Relations Board in December, 1947, upon the insistence of the employer that the terms of the National Labor Relations Act be complied with, assumed jurisdiction over the labor relations of the employer, conducted an election among its employees represented by Division 998, and certified that Division 998 was authorized to enter into a "union security" agreement with the employer pursuant to Sections 8 (a) 3 and 9 (e) of the Labor Management Relations Act (R. 141, 153-154).

A contract between Division 998 and the employer covering wages and working conditions of the employees represented by Division 998 expired December 31, 1948 (R. 129). This contract provided, among other things, that should any dispute arise during the terms of the agreement, or over the terms of a new collective bargaining agreement, such dispute would be submitted to final and binding arbitration before a tribunal created by mutual consent and choice of the parties (R. 142). Division 998 offered to settle the instant controversy relating to the terms of a new agreement by submitting the same to a voluntary arbitration tribunal as aforesaid, but, despite such offer, the contract providing for voluntary arbitration was unilaterally terminated by the employer (R. 142).

Because of the failure of the parties to come to an agreement, and on or about January 3, 1949, the membership of Division 998, by secret ballot, voted to authorize its executive board to call a strike at such time as the board deemed proper. The executive board fixed the date of the strike for 4 o'clock A. M., Wednesday, January 5, 1949, and released an announcement to that effect to the newspapers (R. 130, 152).

The respondent Board immediately thereafter commenced the action which is the subject of these proceedings, alleging in its complaint that the petitioners did instigate, induce, conspire with and encourage persons em-

played by the employer to engage in a strike and work stoppage which would cause an interruption of an essential service, and that petitioners threatened to and would continue so to do in violation of Section 111.62, Wisconsin Statutes, unless restrained by the court (R. 120-124). The Circuit Court of Milwaukee County issued a temporary restraining order prior to the effective time of the strike (R. 119). Petitioners complied with the order (R. 132).

Petitioners thereafter filed their answer, in which they alleged, among other things, that any judgment granting the relief prayed for in the complaint, and the statutes upon which such a judgment might purportedly be based, would be null and void because contrary to provisions of the United States Constitution and the Constitution of the State of Wisconsin (R. 139-145).

Prior to the filing of such answer, and trial of the case, the following events took place, and their occurrence was set forth in the answer.

A petition for the appointment of a conciliator, pursuant to Section 111.54, Wisconsin Statutes, was filed by the employer. A conciliator was appointed (R. 143). Division 998 and the employer met with the conciliator, but the employer's final offer during the process of conciliation was less favorable to the union than any offer it had made previous to conciliation (R. 143).

During the process of conciliation, the employer insisted that the matter could only be determined by statutory arbitration, as provided in subchapter 3 of Chapter 111, Wisconsin Statutes, and refused all offers of voluntary arbitration and recommendations of the conciliator (R. 144).

On February 9, 1949, Division 998 filed a charge with the National Labor Relations Board alleging that the em-

ployer had committed and was continuing to commit unfair labor practices by failing to bargain in good faith under the provisions of Sections 8 (a) (1) and (5) of the National Labor Relations Act, as amended, because of its conduct as immediately hereinabove set forth. Such charges are now pending before the National Labor Relations Board (R. 144).

When the action came on for trial of the issues, respondent moved for judgment on the pleadings (R. 151, 155). The Circuit Court, without taking any testimony, entered the judgment as prayed for, perpetually enjoining the petitioners (including the members of petitioning union) from " * * * calling a strike, going out on strike or causing any work stoppage which would cause an interruption of the passenger service of the Milwaukee Electric Railway and Transport Company in the State of Wisconsin, and from instigating, inducing, conspiring with, or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company; all subject to Section 111.64, Wisconsin Statutes" (R. 155-156).

On appeal to the Wisconsin Supreme Court, judgment was affirmed (R. 163). Rehearing was denied (R. 173).

SPECIFICATION OF ERRORS

The Supreme Court of the State of Wisconsin erred:

1. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in conflict with the Labor Management Relations Act, 1947, 61 Stat. 136, and, therefore, not in violation of Article I, Section 8, and Article VI of the Constitution of the United States.^b

2. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

3. In holding that Sections 111.50-111.65, and particularly Section 111.62 thereof, were not in violation of the Thirteenth Amendment to the Constitution of the United States.

4. In affirming the judgment of the Circuit Court of Milwaukee County directing the entry of a permanent injunction.

✓

SUMMARY OF ARGUMENT

I

The Wisconsin statute and judgment violate the Commerce clauses of the Constitution, because they have been applied to an industry and a relationship which are clearly covered by the National Act, and in which state action has been precluded either because of complete congressional occupation of the field, or because of conflict with the National Act.

A

Congress has completely occupied the field of peaceful strikes for higher wages in industries which affect interstate commerce. **International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., etc. v. O'Brien, etc.**, 339 U. S. 454 (1950). If states are powerless to delay strikes for higher wages, pending exhaustion of state mediation processes, and if they are powerless to condition the legality of such strike on majority-voted approval, a fortiori, Wisconsin cannot absolutely prohibit the same type of strike merely because of the accident of the industry in which it occurs.

1. Contrary to the state's contention, Title II of the Labor Management Relations Act, 1947, affords no basis for distinguishing the holding in the **O'Brien** case, *supra*, since Title II was expressly considered by the court. In referring to Sections 206-210 of that Title and Section 8 (b) (4) of Title I the court said, "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages." This conclusion of the court is supported by the legislative history, congressional debates, and committee reports.

An attempt to amend the final bill so as to make all titles separate pieces of legislation was rejected by the

Senate (93 Cong. Rec. 4264) because it was considered that all provisions and titles were mutually interrelated and intertwined as a complete legislative program dealing with collective bargaining, and because the Act was predicated on the theory of the Wagner Act that free collective bargaining was the solution of the labor problem in the United States (93 Cong. Rec. 4261-4262, 7536-7537).

The legislative history also shows that H. R. 3020 (the Hartley bill) as it passed the House dealt specifically with "transportation and public utilities" in which strikes would imperil "the public health and safety," but such broad coverage was eliminated by the Senate and concurred in by the House in the final Act. Additionally, five identical bills (H. R. 17, 34, 68, 75, 76) were introduced in the House for the purpose of permitting state and local governments to handle strikes endangering the public health and safety, but were abandoned in favor of the legislation that was passed. Extension of Remarks of Rep. Case, 93 Cong. Rec. A-1007.

The report of the Senate Committee on Labor and Public Welfare (S. Rep. No. 105, 80th Cong., 1st Sess., p. 13) clearly pointed out that compulsory arbitration proposals were considered but not adopted because of past experiences of the Federal Government. In support of such report and defending the Bill, Senator Taft, its co-author and manager on the floor of the Senate, expressed the Senate Committee's belief that the solution of the country's labor problems must rest on a free economy and on free collective bargaining; that the bill was based on that proposition; that the right to strike for improvement of wages, hours and working conditions was protected in spite of the inconvenience, and in some cases danger, to the people of the United States; and that no exception was made with respect to public utilities. 93 Cong. Rec. 3835.

Consistent with this policy, the only limitations put on the right to strike were to require sixty-day notices when

a contract was in effect [Section 8 (d)]; prohibition of strikes for certain enumerated purposes [Section 8 (b) (4)]; and temporary delay of strikes, which the President of the United States believes may imperil the national health and safety (Sections 206-210). Where state policy was to have supremacy, specific provision was made in Section 14 (b); and where state assistance in the mediation process was thought advisable, it was permitted by Sections 8 (d), 202 (c) and 203 (b).

2. There is not any basis for treating privately-owned public utilities as having a different or preferred status under the federal Act. They are not excluded from the definitions [Section 2 (2)], which by Section 501 (3) are incorporated in all titles of the law. They were never excluded by the courts. **Consolidated Edison Co. v. National Labor Relations Board**, 305 U. S. 197, 221-223. And they were never excluded by the National Board, even in strike situations. **In the Matter of El Paso Electric Company**, 13 N. L. R. B. 213, 240.

3. There is no basis for reliance on the decision in **International Union, United Automobile Workers, A. F. of L., v. Wisconsin Employment Relations Board**, 336 U. S. 245, since the **O'Brien** case, *supra*, makes it clear that such decision did not deal with the traditional peaceful strike for higher wages, but with activities similar to the "sit-down" and to "labor violence."

B

Even if there were not complete congressional occupation of the field the Wisconsin statute could not stand since the two laws, as they deal with "emergency" situations, cannot consistently stand side by side. **Hill v. Florida**, 325 U. S. 538.

1. The very process of collective bargaining assumes the ability of the collective group to approach equality with

their employer by having the legal right to leave their work in concert. **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209. But under the Wisconsin statute and judgment the strike is not permitted to perform its function as an aid to collective bargaining. By contrast, analysis of the provisions of Title II demonstrates congressional emphasis on the policies of voluntarism and free collective bargaining to the extent that even in narrowly-defined national emergency situations, a strike or threatened strike is only temporarily delayed, but not prohibited (Sections 206-210).

2. The Wisconsin law operates on a different timetable in its mediation and conciliation process than does the federal law. That it actually interferes with the federal mediation and conciliation process appears from the First Annual Report of the Director of the Federal Mediation and Conciliation Service, who states that because of laws of this type the Service has refrained from taking the leading rôle in mediation of disputes, which otherwise are covered by the Congressional language. First Annual Report, Federal Mediation and Conciliation Service, p. 39 (1949).

3. Since the Wisconsin law purports to deal with "effects" of strikes in certain industries, as do Sections 206-210, there should be consistency in the tests applied. However, the Wisconsin law does not purport to deal with "emergency" situations. It broadly covers all "interruptions" of an "essential service," whether such interruption creates an emergency or not. The statute defines "essential service" [Section 111.51 (2)]; determination if an "interruption" will occur is made by the Wisconsin Board (Section 111.54). No effort is made to weigh the effect of the "interruption" on the type of "essential service."

On the other hand, the invoking of Sections 206-210 of the national law is dependent upon whether a strike will "imperil the national health and safety," a fact to be de-

terminated in each case as it arises, both administratively (Section 206) and judicially (Section 208).

4. The possibility of conflict and overlapping jurisdiction in the application of the state and federal laws are real and many. Both might very well be applied to the same situation in an actual strike situation, yet they could not be applied consistently.

C

Although it is argued that reversal of the judgment will unduly prejudice the state there is no merit to such argument since:

(1) the Wisconsin law does not purport to deal with "disaster" or "catastrophe" situations, nor is there the slightest suggestion that the state was confronted with such situation here; (2) if a strike in a major metropolitan area like Milwaukee would cause a critical situation, it is not likely that federal intervention will be withheld merely because the incidence of the dispute may fall most heavily on a particular local area; (3) strikes in public utilities occur rarely, so rarely that only eleven states have attempted any special treatment of the problems; (4) in those rare situations where a serious condition may arise, and if the federal government doesn't intervene, supremacy of the federal law might be averted by state seizure which would then remove the state, as an employer, from the coverage of the federal statute; (5) Congress has already considered the argument but rejected it in the national interest.

II

The absolute and sweeping restraint of the statute and injunction are in violation of the due process clause of the Fourteenth Amendment since they embrace restraints on fundamental human liberties such as the right of free

speech, public assemblage, freedom of contract and freedom to dispose of one's labor. **Wolff Packing Co. v. Court of Industrial Relations**, 262 U. S. 522. See **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184; **Near v. Minnesota**, 283 U. S. 697; **Thomas v. Collins**, 323 U. S. 516. On the other hand, this case is to be distinguished from **Wilson v. New**, 243 U. S. 332, which dealt with an acute national crisis, and which, as was later pointed out in the **Wolff** case, *supra*, "went to the borderline". Since the Wisconsin law combines a restraint on strikes with compulsory arbitration, and is applicable to all "interruptions" of an "essential service", it cannot meet the test of "clear and present danger". **Wolff Packing Co. v. Court of Industrial Relations**, *supra*.

There is also violation of due process in the vague language employed. To impose upon working men the duty to speculate on whether contemplated action will cause an "interruption" in a situation where the efficacy of the strike cannot be weighed violates the first essential of due process. **United States v. L. Cohen Grocery Co.**, 255 U. S. 81.

III

The Wisconsin statute and judgment impose involuntary servitude in violation of the Thirteenth Amendment since for all practical purposes the public utility worker does not possess the individual right to quit. The nature of his employment is such that the special skills required for a public utility employer cannot readily be used for other employers in the area covered by the monopoly. There is thus "no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." **Pollock v. Williams**, 322 U. S. 4, 17-18.

ARGUMENT

I

THE STATUTE AND INJUNCTION REPRESENT AN ATTEMPTED EXERCISE OF STATE POWER IN VIOLATION OF ARTICLE I, SECTION 8, AND ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES

In the instant case the employer and its employment relationships are clearly within the scope of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Supp. II, 141-197, and subject to the jurisdiction of the National Labor Relations Board (R. 108, 140-141, 153). **National Labor Relations Board v. Baltimore Transit Company**, 140 F. 2d 51 (C. A. 4, 1944), cert. den., 321 U. S. 796; **W. C. King d/b/a Local Transit Lines**, 91 N. L. R. B. No. 96 (1950). In the last cited case the National Labor Relations Board reaffirmed its jurisdiction over public utilities generally, and local transit companies specifically, saying:

"Our experience has shown that public utilities, including public transit systems of the type here involved, have such important impact on commerce as to warrant our taking jurisdiction over all cases involving such enterprises, where they are engaged in commerce or in operations affecting commerce, subject only to the rule of de minimis. Accordingly, we will hereafter assert jurisdiction in all other cases involving public utilities and public transit systems of the type here involved, subject only to the foregoing limitation."

The coverage of the national Act is further and conclusively demonstrated in this case since, at the employer's insistence, the jurisdiction of the National Labor Relations

Board was actually invoked and exercised about one year before the present dispute arose (R. 141, 153-154); and there is now pending before the national Board a charge filed by petitioners against the employer based upon the instant controversy (R. 144).

For all of the above reasons the respondent and the state courts properly assumed that the National Labor Relations Act would ordinarily apply, but rested their position on what they considered to be the lack of conflict between the state and federal laws, as well as upon the state's superior power in a dispute of this type.

This case thus presents the question of whether the state action "impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act" (**Allen Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board**, 315 U. S. 740, 750); or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress (**Hill v. Florida**, 325 U. S. 538, 542); or whether "Congress occupied this field and closed it to state regulation" (**International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., etc., v. O'Brien, etc.**, 339 U. S. 454. See also **Plankinton Packing Co. v. Wisconsin Employment Relations Board**, 338 U. S. 953; **LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board**, 336 U. S. 18; **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767).

A

**Congress Has Completely Occupied the Field in Which
the State Law Attempts to Operate**

Since the recent decision of this court in the case of **International Union etc. v. O'Brien**, 339 U. S. 454 (1950) (hereinafter called the **O'Brien case**), it is no longer open

to question that Congress in enacting the Labor Management Relations Act, 1947, manifested its intention to exclude the states from adopting or enforcing regulatory or prohibitory legislation with respect to peaceful strikes for higher wages where interstate commerce is affected. In that case a state law requiring majority-voted approval of such type of strike was declared beyond the state's power of enforcement because in violation of the Commerce Clause of the Constitution. It was held that by enactment of the Labor Management Relations Act, 1947, " * * * Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." It was further held that none of the provisions of the federal Act (including Sections 206-210 of Title II) could " * * * be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation." 339 U. S., at p. 457.

If the states are powerless to delay strikes for higher wages pending the intervention of state mediation agencies, and if they are powerless to restrain or to make criminal the calling of, or going out on, such strikes unless a majority of the employees involved have so voted by secret ballot, it would seem, a fortiori, that the states cannot absolutely prohibit such strikes. Yet Wisconsin here claims the right to do so. It claimed such right in the instant case prior to the decision of this Court in the **O'Brien** case, supra, which was announced six (6) days after announcement of the state court's decision. Although this court's decision was immediately called to the attention of the state court in petitioners' brief in support of their Motion for Rehearing, the Motion for Rehearing was denied without opinion.

It is apparent, however, from the Wisconsin court's subsequent decision in the case of **Wisconsin Employment Relations Board v. Milwaukee Gas Light Co. et al.**, not

yet officially reported (pending here as Case No. 438, October Term, 1950), and from the respondent's brief opposing certiorari in this case, that the state believes that the **O'Brien** case was decided under Title I of the Act, whereas consideration of this case in the light of Title II of the Act yields a contrary result. It further appears that the state relies on an alleged distinction between what the state's powers may be in dealing with labor management relations in privately-owned public utilities as contrasted with its powers in dealing with other privately-owned enterprises; and the state continues to rely on the decisions in **International Union, United Automobile Workers, A. F. of L., etc., et al. v. Wisconsin Employment Relations Board**, 336 U. S. 245, as giving unlimited power to the states in controlling strikes.

Those points will be considered in order below.

1. **Title II cannot be separated from Title I, nor does independent consideration of Title II result in any different conclusion with respect to the state's power to act.**

While it is true that Title II was not directly involved in the **O'Brien** case, it was nevertheless explicitly considered by the court in that case and was an important consideration in the court's conclusion. That is apparent from the decision itself.

In footnote 3 to the court's observation that in both the National Labor Relations Act and the Labor Management Relations Act, 1947, Congress expressly recognized the right to strike, reference is made to Senator Taft's statement (93 Cong. Rec. 3835) which dealt in great detail with congressional consideration of imposing limitations on the right to strike in public utilities, and which concluded that nothing was done "to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation."

Following its reaffirmation of the "right to strike," the court pointed to the only two types of strikes which Congress had limited, and which did not affect appellants in that case: (1) strikes for improper objectives under Section 8 (b) (4) of Title I, and (2) strikes which might create a national emergency under Sections 206-210 of Title II. Immediately after such reference to Title II the court stated: "**None** of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages." (Emphasis ours.) Among the cases cited in support of this statement is one which dealt specifically with a Wisconsin public utility—**LaCrosse Telephone Corp. v. Wisconsin Board**, 336 U. S. 18.

In spite of such clear holding, the argument of the state, in effect, is that Titles I and II must be considered as two separate and distinct legislative acts. The fact is that Congress expressly rejected a motion that would have accomplished that result. 93 Cong. Rec. 4264. In successfully opposing the motion, Senator Taft made it clear that all provisions and titles of the Act were interrelated; that Title I was primarily devoted to securing agreement between employers and employees and to protecting the right of employees to make such agreement; that Title II set up mediation and conciliation machinery to encourage and bring about such agreement; that the temporary delays by injunction in "national emergency" disputes was to provide further opportunity for mediation; that the provision for employee votes on accepting the employer's last offer was to ascertain if an agreement could be reached; that all provisions were "intertwined"; and that the entire act was intended to be a complete "legislative program dealing with collective bargaining." 93 Cong. Rec. 4261-4262.

Again, later in the session when the presidential veto was being considered, Senator Taft repeated that the entire Act was based upon the Wagner Act "on the theory that the solution of the labor problem in the United States is

free, collective bargaining;¹ that an employer and all of his employees, acting as one man, "shall be free to make the bargain they wish to make"; that the right to strike after discharge of the temporary injunction "is essential to the maintenance of freedom in the United States"; that compulsory arbitration was rejected because of the policy not to impose upon workers "any conditions to which they, through their representatives, do not agree"; and that "free collective bargaining" had not been modified by the Act in any material way. 93 Cong. Rec. 7536-7537.

This congressional scheme of one integrated, interdependent legislative enactment also appears from Title V of the Act, which incorporates all of the essential definitions of Title I into all other provisions of the Act [Section 501 (3)].

Further evidence that Title II does not, because it deals with national emergencies, impliedly permit the state to handle "local" emergencies affecting interstate commerce is supplied by reference to the provisions of H. R. 3020 (the Hartley Bill) which, together with S. 1126, finally emerged as the Act. Title II of H. R. 3020, as it passed the house, dealt with "Strikes Imperiling Public Health and Safety." Under Section 203 (a), if a labor dispute "has resulted in, or imminently threatens to result in, the cessation or substantial curtailment of interstate or foreign commerce in **transportation, public utility**, or communication services essential to the public health, safety, or interest," the acts creating such situation were to be subject to restraint. The pattern of such proposed restraint is not material here except to note that in the proposed legislation, as in the Act as finally passed, there was no duty to accept any proposal of settlement [Section 204 (d)] and that the injunction was to be discharged after the procedures for conciliation, mediation, and advisory settlement were exhausted [Section 204 (f)].

¹ See S. Rep. No. 573, 74th Cong., 1st Sess. (1935).

The provisions of the House Bill thus embraced more than the limited type of dispute with which the provisions of Title II are concerned.

The rejection of the House provisions, including, as they did, specific reference to "public utilities" and "public health, safety or interest," and limiting the application of Sections 206-210 to strikes affecting an "entire industry or a substantial part thereof" which would "imperil the national health" (Section 206), present persuasive evidence that there was no inclination on the part of the Congress to enlarge the area of exception. And while it is true that employees of public utilities, under certain circumstances, will be subject to the provisions of Sections 206-210, they become so subject, not because of their employment by public utilities as such, but because of the effect their strike may have on the national health or safety.

As pertinent as is the Bill which was passed by the House are the Bills which were introduced but rejected. Five identical Bills (H. R. 17, 34, 68, 75, 76) were introduced setting forth the policy of their authors that strikes endangering the public health should be outlawed, some alternative means provided to settle such disputes, and that "state and local governments should have the responsibility and should be permitted by the Federal Government to exercise the responsibility to handle just as many of these situations as it is possible for them to do." These Bills provided that the President could act in emergency situations created by suspension or substantial curtailment of public utility and communication service, among others, if "local government facilities to prevent the work stoppage are not being or cannot be effectively utilized." One of the arguments made in favor of such legislation was that it would give "local and state governments first opportunity to deal with all disputes within their jurisdic-

tion if they can handle them adequately." Extension of Remarks of Rep. Case, 93 Cong. Rec. A-1007.² Failure of this type of proposal to secure Congressional approval is eloquent witness to the Congressional policy and purpose.

Any doubt that there may be with respect to the Congressional intent in this matter, regardless of whether Article II is considered alone or in connection with Title I and other provisions of the Act, is completely dissipated by the majority Report of the Senate Committee on Labor and Public Welfare (S. Rep. No. 105, 80th Cong., 1st Sess., p. 13):

"In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of these suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation."

With specific reference to Title II, the Report states (p. 28):

"The theory of this section is that it is not desirable in an economy such as ours for the Federal Government to play a partisan role with respect to disputes between management and labor and that compulsory arbitration is not an effective or desirable method to be employed."

² No effort is here made to detail all of the legislative proposals for anti-strike and compulsory arbitration legislation in the field of public utilities. An illuminating discussion of proposals of this type made during the ten years preceding the enactment of the Labor Management Relations Act of 1947, and during the 80th Session of the Congress, will be found in Millis and Brown, *From the Wagner Act to Taft-Hartley*, 32-392 (University of Chicago Press, 1950).

Senator Taft, the co-author of the amending Bill, and its manager on the floor of the Senate, when presenting the majority report of the Senate Committee on Labor and Public Welfare further elaborated on the Committee Report as follows (93 Cong. Rec. 3835):

"We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. * * *

"It is suggested that we might do so in the case of public utilities; and I suppose that the argument is stronger there, because we fix the rate of public utilities, and we might, I suppose, fix the wages of public utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that is necessary to do is to forbid strikes, fix wages and compel men to continue working, without consideration of the human and constitutional problems involved in that process.

"If we begin with public utilities it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the Bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation."

Thus, the sponsors and authors of the amended Act felt that basic to the purposes to be accomplished by the Act was the protection of the right to strike in aid of collective bargaining and other mutual aid and assistance, even though the exercise of such right in some circumstances may involve inconvenience and hardship to the public.

The only limitations imposed upon such right to strike by the Congress were:

1. The requirement of a sixty (60) day notice when a contract was in effect [Section 8 (d)].

2. Prohibition of certain types of strikes which were for the purpose of accomplishing objectives which were considered to be against public policy [Section 8 (b) (4)]; which type of strikes were subject to injunctive process [Section 10 (j), (l)], and the basis for civil action for damage (Section 303).

3. Temporary delay of strikes which the President of the United States believes may imperil the national health or safety (Sections 206-210).

In view of these specific exclusions from the general policy of the law, which exclusions appear in both Titles I and II, and in light of the legislative history with respect to attempts to prohibit strikes and to require compulsory arbitration in public utilities, it is clear that Title II cannot be read as yielding to the states any part of the field which was occupied by Congress in the enactment of the Labor Management Relations Act, 1947. Title II represents a very limited exception to the basic policies and principles set forth in Title I; an exception which comes into being under a narrowly-circumscribed set of circumstances and for a limited period of time, but which nevertheless recognizes, in the terminal point of its procedures, the basic right to strike in aid of collective bargaining.³

³ In Sections 206-210 Congress placed its faith on the force of public opinion. S. Rep. No. 105, 80th Cong., 1st Sess., p. 15.

Where Congress thought the state could consistently cooperate with the federal Government in the mediation and conciliation process, it made express provisions for doing so [Sections 8 (d), 202 (c), 203 (b)]. Had it intended that the states could, in addition to assisting in that process, devise its own method of settlement of disputes, different from that thought best by Congress, it would have done so, just as it had with respect to other important policy provisions [Section 14 (b)].

It cannot be validly argued, as does the state, that the Senate Report and congressional statements are limited to federal policy, and therefore cannot be construed as intending or evidencing any intention that the states shall be bound by such policy. For if this argument were valid then all previous decisions of this court on the question go for naught, and we have left only the "patch work" referred to in **National Labor Relations Board v. Hearst Publications, Inc.**, 322 U. S. 111, 123, and the obstacles "to the accomplishment and execution of the full purposes and objectives of Congress", which this court refused to permit in **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767, 773, and **Hill v. Florida**, 325 U. S. 538, 542. The **O'Brien** case, *supra*, would become a mere exercise in rhetoric. If the states can carve out of the federal field in which Congress has legislated all privately-owned public utilities, something which the federal Congress, the National Board and this court have never before permitted, for policy reasons deemed sufficient to them, then Michigan can do so with its vital automobile industry, Texas with its oil, and Pennsylvania with its steel and mines, as can all other states having a dominant industry in which a strike will have a far-reaching effect on local health, safety and morals.

It is submitted that there is no merit to the suggestion that Title II must be considered independently of Title I, or that Title II, any more than any other provision of the

Act, permits of state intrusion into the field found in the **O'Brien** case, *supra*, to be so completely occupied by Congress.

2. A privately-owned public utility employer does not have any preferred or different status under the federal law than does any employer engaged in ordinary commercial or industrial enterprises.

It is also urged that public utilities are agents of the state, performing functions which the state would otherwise be required to perform if not undertaken by privately-owned corporations. From this premise, it is then argued that "the decision in this case should be made on the basis of the same legal principles as would apply if all the public utilities of Wisconsin were owned and operated by the state." (Respondent employer's Brief in Opposition, Case No. 330, p. 7.) The Wisconsin Supreme Court takes a less extreme position⁴ in the more recent case of **Wisconsin Employment Relations Board v. Milwaukee Gas Light Co. et al.** (now pending here as Case No. 438, October Term, 1950), resting its position on the theory that the greater right of control over public utilities by the state should give it immunity from the superior federal power.

This argument not only overlooks the legislative history and congressional record referred to above, but also ignores the fact that while states and their political subdivisions were expressly excluded from the definition of "employer" in the federal Act [Section 2 (2)], privately-owned public utilities were not. It also ignores the fact that in Title V the definition of "employer", and all other pertinent definitions contained in Title I, are incorporated into Title II of the Act [Section 501 (3)]. Thus, by definition, there is no exception in the Act which would give

⁴ It could hardly do otherwise since the Wisconsin Act in question here defines a "public utility employer" as "any employer (other than the state or any political subdivision thereof) * * *." Section 111.51 (1).

to privately-owned public utilities any preferred status under the Act.

Additionally, privately-owned public utilities have never been treated by the National Labor Relations Board, the lower federal courts, nor this Court as other than private employers covered by the federal Act,

In one of the early cases involving the applicability of the federal Act to a local public utility, the public utility urged that state legislation, including legislation relating to the operation of public utility companies, prevented the exercise of jurisdiction by the National Labor Relations Board. This argument was rejected. **Consolidated Edison Co., etc., et al., v. National Labor Relations Board**, 305 U. S. 197, 222-223.⁵

In a number of subsequent cases the Court dealt with disputes involving public utility employers but drew no distinction between such employers and others insofar as the provisions of the federal Act were concerned. **National Labor Relations Board v. Virginia Electric and Power Co.**, 314 U. S. 469; **National Labor Relations Board v. Indiana and Michigan Electric Co.**, 318 U. S. 9; **National Labor Relations Board v. Southern Bell Telephone and Telegraph Co.**, 319 U. S. 50; **La Crosse Telephone Corp. v. Wisconsin Employment Relations Board**, 336 U. S. 18 (also cited in support of the basic holding in the **O'Brien** case, *supra*).

Similarly, the National Labor Relations Board never considered that the federal Act, either before or after its amendment, permitted of any distinction between private industries and privately-owned public utilities. Particularly with respect to the right to strike it early held that

⁵ It appears from the opinion of the Circuit Court of Appeals that the utility argued, as is done here, that consideration of the health, safety and convenience of the residents of the City of New York outweighed the national interest in protecting interstate commerce from disruption, and that extension of the federal jurisdiction to local public utilities would obliterate our dual system of government. The argument was rejected. **Consolidated Edison Co. v. National Labor Relations Board**, 95 F. 2d 390, 394 (C. A. 2, 1938).

“Neither in that Section (Section 13) nor any other does the Act distinguish between public utility employees and those otherwise employed. Hence, there is no valid basis for the contention that the nature of the employment of these employees justified their discharge because they struck.” **In the Matter of El Paso Electric Company**, 13 N. L. R. B. 213, 240, enforced, 119 F. 2d 581 (C. A. 5, 1941).

Under the present Labor Management Relations Act the National Board rejected the argument that the Public Utility Labor Law of Missouri constituted a bar to its jurisdiction. **In the Matter of Middle States Utilities Company**, 81 N. L. R. B. 416, 417, n. 1 (1949). See also **In the Matter of Laclede Gas Light Company**, 80 N. L. R. B. 839, 842 (1948).

It is submitted the argument has neither relevance nor merit.

3. None of the other recent decisions of this court sustains the state's position.

The state also argues that despite the **O'Brien** case, *supra*, the holding of this court in the case of **International Union, United Automobile Workers, A. F. of L., v. Wisconsin Employment Relations Board**, 336 U. S. 245 (hereinafter referred to as the **Auto Workers** case) permits of the type of prohibition here involved. But the **O'Brien** case makes it clear that the **Auto Workers** case “was not concerned with a traditional, peaceful strike for higher wages,” but with activities that were similar to the “sit-down strike” and “labor violence.” 339 U. S. at p. 459. The **Auto Workers** case, therefore, does not stand for the proposition that the state may define as unlawful those activities which are otherwise lawful under the federal Act. It held only that if the activities are not protected activities under the federal Act, the state is free to act. The activities here involved are lawful under the federal Act, and arose under circumstances indistinguishable from

those in the **O'Brien** case, excepting only the type of industry involved.

In relying on this court's decision in the **Auto Workers** case, *supra*, and disregarding the flat holding of this court in the **O'Brien** case, *supra*, the state paid no attention to the statement of the majority in the **Auto Workers** case that:

"No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert." 336 U. S. at p. 258.

Section 111.62 of the Wisconsin Statutes does expressly make concerted activities, otherwise lawful, a criminal conspiracy subject to restraint and punishable as such. It is the concert of activities that Section 111.62 is directed against, as contrasted with individual activities which are permissible under Section 111.64, even if exercised on a mass, though individually-conceived, basis and having like results.

Nor are the cases of **Giboney v. Empire Storage and Ice Co.**, 336 U. S. 490; **Building Service Employees v. Gazzam**, 339 U. S. 532, and **International Brotherhood, etc., v. Hanke**, 339 U. S. 470, applicable here. None of such cases involved the question of peaceful strikes for higher wages or questions of conflict with the federal Act.

B

The Wisconsin Law Is in Direct Conflict With the Federal Law

Petitioners submit that under the **O'Brien** case, *supra*, no power remains in the state to prohibit peaceful strikes for lawful purposes, regardless of what industry may be involved, if interstate commerce is affected. We believe that the court's statement in the **O'Brien** case that "even if

some state legislation in this area could be sustained, the particular statute before us could not stand," does not at all qualify its earlier statement in the same case relating to complete congressional occupation of the field, but was intended to emphasize the soundness of the earlier principle enunciated. It is conceivable that the court may have had in mind, when it made the later statement, strikes for purposes other than those referred to, but, in its context, it could not have intended to distinguish between the types of industries involved or to indicate that the answer would be different, depending upon the **effect** of a strike as distinguished from its **methods** or **purposes**.

However, if it were to be held that there was no such complete congressional occupation of the field so as to exclude the state from acting in the field of public utility disputes, it is submitted that whatever action the state does take in dealing with "emergency" situations must "move freely within the orbit" of the purpose of the federal law dealing with the same subject, without the laws "infringing upon one another." **Hill v. Florida**, 325 U. S. 538, 543. The Wisconsin law cannot meet this test, either with respect to its policy or with respect to its specific provisions.

1. There is basic conflict in policy and in method of treatment in the special field.

Wisconsin's absolute prohibition on the right to strike in support of collective bargaining does violence to the entire concept of the collective bargaining process protected by the federal Act which, realistically, is the process by which employees through self-organization, although under considerable economic compulsion to continue to work, are able to deal on terms approaching equality with the employer for the aggregate of the employees' services because of the employees' legal right and actual ability to quit work in concert. Labor Management Relations Act, Sections 7 and 13; **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209; **Texas and New**

Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548, 570; **National Labor Relations Board v. Mackay Radio and Telegraph Co.**, 304 U. S. 333, 345, 347; **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, 256.

Obviously, if the employees are not legally free to quit in concert, or to agree among themselves upon minimum conditions which they will accept for continued service, or to advocate concerted quitting in a union meeting, or to notify the employer of their decision, such employees are not in a position to bargain for their aggregate services.

One cannot bargain for that which he does not have the legal power to withhold.⁶

Under the Wisconsin law the strike is not permitted to perform any function whatsoever as an aid to collective bargaining. The law makes the mere threat, call, or vote to strike a misdemeanor. Thus, the strike cannot "make effective the collective bargaining power which Section 7 of the Wagner Act guarantees", Douglas, J., dissenting in

⁶ In *Labor and National Defense* (Twentieth Century Fund, 1941), at page 70, it is pointed out that:

"The right to quit work in a body is labor's main bargaining weapon. Rarely used by a strong trade union, it is an implicit economic sanction, always in the background of collective bargaining."

George W. Taylor, Professor of Industry, Wharton School of Finance and Commerce, University of Pennsylvania, and former Chairman of the National War Labor Board, in his "Government Regulation of Industrial Relations" (Prentice-Hall Inc., 1948), observes at pages 21-22:

"As an inducer of peaceful settlements, the right to strike is most effective when the parties know that a work stoppage, actually called, will continue until an agreement is reached. The greater the risk, the more reason for compromise and agreement. If the known policy of the government is to intervene promptly in order to prevent any protracted stoppage of production, as during the war and shortly thereafter, the risks of a shut-down are minimized and the reasons for compromise and agreement around the conference table can quickly disappear.

"A right to engage in industrial warfare is essential to the cause of industrial peace under the collective bargaining system. Such a notion is perplexing and anomalous. It is, nevertheless, a very practical principle in a world where the golden rule is still far from accepted as a universal guide for conduct. Many a labor agreement is not signed until 'one minute before twelve,' after last-ditch positions have been taken by both sides with an eye to what it is worth in 'concessions' to avoid a shut-down."

International Union, United Automobile Workers, A. F. of L., v. Wisconsin Employment Relations Board, 336 U. S. 245, 266.

Congressional reliance on the principles of free collective bargaining in handling emergency situations, with no absolute limitation on the right to strike, appears as conclusively from analysis of Title II, as it does from the legislative history and debates.

Section 201 (a) affirms the policy of the United States that "sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees."

This emphasis on voluntary settlements is repeated and re-emphasized in Section 201 (b) which establishes the policy of encouraging the settlement of issues "between employers and employees through collective bargaining * * * by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration" as aids and encouragements to the parties "to reach and maintain agreements" and to settle their differences by "mutual agreement through conferences and collective bargaining."

Section 202 (c) authorizes the Director of the Service to establish "suitable procedures for cooperation with state and local mediation agencies."

Section 203 (a) imposes the duty on the Service to assist the parties to settle their disputes through "conciliation and mediation"; Section 203 (b) provides for state **mediation and conciliation**, if available, in disputes having only a "minor" effect on interstate commerce, and again enjoins the Service to use its best efforts to bring

about "agreement". Section 203 (c) directs the Service, if it fails to settle the dispute, to induce the parties "voluntarily to seek other means of settling the dispute * * *", but the failure or refusal of any party to agree to any procedure suggested "shall not be deemed a violation of any duty imposed by this Act." Section 203 (d) repeats the federal policy of voluntarism in stating that "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." [This is to be compared with the Wisconsin law which applies to disputes over the interpretation of a contract, as well as to disputes over the terms of a new contract. Section 111.57 (2).]

Section 204 sets forth the policy that employers and employees and their representatives shall exert every reasonable effort to make and maintain agreements, expeditiously settle disputes arising under contracts, and participate fully and promptly in meetings which might be undertaken to aid in settlement of such disputes.

By Section 205 there is created an advisory panel to advise with respect to "mediation and voluntary adjustment" of controversies.

Thus Title II, no less than Title I, rejects, as federal policy, the elements of compulsion or governmental dictation in the settlement of disputes. It is based upon free collective bargaining, and, as in Sections 8 (d) (3) and 14 (b) of Title I, where state participation is contemplated in furtherance of this policy, such participation is specifically referred to [Sections 202 (c) and 203 (b)].

Consistent with this emphasis on voluntarism, and collective bargaining as the federal policy in the settlement of disputes, Sections 206-210 represent the considered policy of Congress to provide for the temporary delay or re-

straint of strikes in national emergency situations, and in such situations only, so as to permit full use and exploration of all voluntary methods of agreement with the aid of governmental agencies.

The situation in which Sections 206-210 become applicable is narrowly limited to strikes "affecting an entire industry or a substantial part thereof" which "will, if permitted to occur or to continue, imperil the national health or safety." Under such circumstance, the President may set into motion procedures which, in their early stages, lead to the issuance of an injunction (Section 208).

During the period the injunction is in effect, the emphasis is again placed on voluntary settlement, Section 209 (a) requiring the parties to make every effort to "adjust and settle their differences" but further providing that "neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service."

Failing voluntary settlement during a period of 80 days the injunction against strikes is discharged and the strike is permitted to run its course (Section 210).

This treatment of strikes in a situation of carefully-defined emergency is to be contrasted with the absolute prohibition imposed by Wisconsin in blanket fashion over an entire segment of industry without regard to the nature of the emergency, if any. The basic inconsistency is irreconcilable.

2. The Wisconsin law actually interferes with and impedes the part which Congress intended for the federal mediation process.

Comparison of the provisions of the federal Act dealing with the role to be played by mediation and concilia-

tion, and the time table of its application, shows further inconsistency in the Wisconsin law.

Under the federal Act the period of mediation may start sixty days before the contemplated strike or lockout action, and the Federal Mediation and Conciliation Service must be notified no less than thirty days before such time [Section 8 (d) (3)].

A strike may be called and may actually take place after compliance with the provisions of Section 8 (d), since whether an injunction will be issued under Section 208 is dependent upon the circumstances. The injunctive process is not necessarily invoked prior to the strike but may be invoked after the commencement of the strike (Sections 206, 208, 210). If an injunction is issued, intensive governmental efforts to obtain a voluntary agreement are continued for a minimum period of eighty days [Section 209 (b)], after which the strike may start or continue (Section 210), and thus perform its function as an aid to collective bargaining.

In sharp contrast, the Wisconsin law does not permit the threat of an actual strike at any time (Section 111.62). The period for mediation or conciliation is limited to fifteen days, after which an arbitration board is convened to hear and determine the dispute (Section 111.55).

That Wisconsin's reliance on compulsion, as contrasted with federal reliance on mediation and conciliation, impedes and interferes with the federal policy appears from the actual experience of the Federal Mediation and Conciliation Service. The Director of the Service, in his first annual report, stated that "State legislation providing for special mediation, arbitration or fact-finding machinery has placed a practical limitation and restriction on any action by the Service." He pointed out that under the broad congressional language "the Service would undoubtedly be justified in regarding it as its duty to me-

diated in many cases in which State utility statutes have prescribed a procedure for the settlement of disputes not consistent with that prescribed by Congress," but for practical reasons, it "has refrained from taking the leading role in the mediation of such disputes" because of such conflict. First Annual Report, Federal Mediation and Conciliation Service, page 39 (Gov't Printing Office, 1949).

3. Insofar as both laws attempt to deal with the effects of strikes within certain industries, different and inconsistent tests are applied.

The Wisconsin law on its face and as applied here does not purport to deal with "emergency" situations; it deals with "interruptions of an essential service" regardless of whether such "interruption" creates an emergency or not. What is an "essential" service is defined by statute [Section 111.51 (2)]; what is an interruption is to be determined, ex parte, by the **Wisconsin Employment Relations Board** (Section 111.54); **Wisconsin Telephone Company v. Wisconsin Employment Relations Board**, 253 Wis. 584, 34 N. W. 2d 844 (1948). No place in the statute is any effort made to weigh the effect of the "interruption" of the "essential service" on the people of the state. On the other hand, whether there shall be any temporary delay of a strike, actual or threatened, under Title II is dependent upon whether it will "imperil the national health or safety," a fact to be determined, in each case as it arises, both administratively (Section 206) and judicially (Section 208).

Thus, while both statutes purport to deal with "effects" of certain types of strikes, rather than methods or purposes, the federal statute is carefully limited in its application to effects which are definitely described, and on a case-to-case basis, while the Wisconsin law **assumes** an effect from the nature of the industry involved, invoking

such assumption without regard to the facts of the particular case.

4. **There is a real possibility of over-lapping jurisdiction in the application of the two laws.**

Among the many "potentials of conflict" (**LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board**, 336 U. S. 18, 26) is the probability that Sections 206-210 of the federal Act and the provisions of the state law may be applied to the same situation. Should that circumstance arise there would be direct collision between the state and federal method of handling the dispute.

The roles which Congress has assigned to the President of the United States, the presidential board of inquiry, the Attorney-General, the National Labor Relations Board and the federal courts would be crowded onto the same stage with the state-assigned roles of the Wisconsin Employment Relations Board, state conciliator, board of arbitration and state courts. From what law then do the players, including the employer and its employees, take their cue?

In addition to this confusion as to who is to proceed and when, another and real source of potential conflict would arise in the event a strike is threatened or should take place in violation of state law, since no small part of the duties of the National Labor Relations Board relates to the problem of applying the provisions of the National Act in strike situations and their aftermath.

Thus, where a strike results from, or is prolonged by, commission of unfair labor practices by an employer, employees are entitled to reinstatement to their original jobs or similar jobs, regardless of whether or not such jobs have been filled during the strike by others; and the employer may be directed to reimburse such employees for wages lost from the time of their unconditional offer to return to work until such time as they are actually

reinstated. **National Labor Relations Board v. Phelps Dodge Corp.**, 313 U. S. 177; if the strike results from an impasse or stalemate in collective bargaining, the striking employees are not entitled to reinstatement if their jobs have been filled, but they may not be discriminated against with respect to whatever employment opportunities may be open then or later. **National Labor Relations Board v. Mackay Radio and Telegraph Co.**, 304 U. S. 333.

The strikers may be without any remedy with respect to reinstatement or back pay if the strike was in violation of contract (**National Labor Relations Board v. Sands Manufacturing Co.**, 306 U. S. 332); contrary to some other federal law of equal importance (**National Labor Relations Board v. Southern Steamship Co.**, 316 U. S. 331); or accompanied by acts which are clearly unlawful (**National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240).

If the strike was called in violation of Section 8 (d) of the federal Act, the employment relationship is severed; if in violation of Section 8 (b) the Board is vested with the discretion to seek a federal court injunction [Section 10 (j)], and in some types of strikes it is required to petition for such injunction [Section 10 (k)]. With respect to these provisions of the Act relating to enforcement of the Act by injunction, it is important to observe that it is the National Board which is given such right and no other person or agency. [**Amazon Cotton Mill Co. v. Textile Workers Union**, 167 F. 2d 183 (C. A. 4); **Amalgamated Association, etc., v. Dixie Motor Coach Co.**, 170 F. 2d 902 (C. A. 8)].

Under Section 2 (2) of the federal Act, employees out on strike retain their status as employees. **National Labor Relations Board v. Mackay Radio and Telegraph Co.**, supra. This important provision was placed in the federal Act to make sure that employees would continue to have the protection of the Act while engaging in the con-

certed activities protected by the Act. For, if this were not done, the result would be "to withdraw the Government from the field at the very point where the process of collective bargaining had reached a critical stage and where the general public interest had mounted to its highest point." S. Rep. No. 573, 74th Cong., 1st Sess., p. 6.

Strikes for recognition as collective bargaining agent are valid under the federal Act. **In the Matter of Perry Norvell Co.**, 80 N. L. R. B. 225.

The decisions of this Court, cited above, all recognize that in these types of situations the duty is placed upon the National Labor Relations Board in the first instance to determine the nature of circumstances which led to the strike, and the rights and duties of the employees and employers under such circumstances, subject to subsequent review in the federal courts.

In the performance of these various functions, the Board is under no obligation to follow state law. **National Labor Relations Board v. Kalamazoo Stationery Co.**, 160 F. 2d 465, cert. den., 332 U. S. 762. Only in those instances where the Board expressly cedes jurisdiction to states having legislation consistent with the federal¹ legislation may the states be empowered to exercise these vital functions [Section 10 (a)].

By contrast and in direct conflict with the varied method of treatment under the federal Act which is entrusted to the National Labor Relations Board, many of the questions which arise in strike situations are pre-determined by the Wisconsin law: participants in the calling of a strike or in the actual strike are guilty of a misdemeanor (Section 111.62); their activities are subject to restraint (Section 111.63); and they may lose their status as employees [Section 111.06 (2) (j), 111.02 (3)].

In the instant case, the strike may have resulted from the commission of unfair labor practices, as claimed by

the petitioners in the charge now pending before the National Labor Relations Board (R. 144), or from an impasse or stalemate in collective bargaining, as was found by the State Board in applying the provisions of the state law (R. 130). Yet, under the state law, all of the questions which may arise with respect to the rights and privileges of the employees had been pre-determined. If the law is upheld, then the many important duties and functions vested in the National Labor Relations Board by the Congress are, to the extent of inconsistency with the state law, completely obliterated. The congressional purposes and policies, as well as the specific duties and functions of the National Board, are thus repealed by state action.

A case-by-case test would be so obviously productive of mischief that it must be rejected. **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767, 776; **La Crosse Telephone Corp. v. Wisconsin Employment Relations Board**, *supra*.

C

An Adverse Decision Will Not Unduly Prejudice the State

Much of the argument against assertion of the superior federal power here is based more upon emotion than upon law. It is urged that rejection of the particular type of state legislation here involved would destroy our dual system of government and leave the states helpless against possible disaster. This is an argument that has been made many times to this court, and rejected by it, without any apparent catastrophic effects or weakening of the Federal Union. It is an argument for which there are many obvious answers, when considered in the light of the facts of the present case:

1. The Wisconsin law does not purport to deal with "disaster" or "catastrophe" situations. It is general,

comprehensive, and automatic in its application. There is not the slightest suggestion in the instant case that a situation imminently dangerous to the community would have arisen if the strike were permitted to proceed.⁷

2. If a strike, or threatened strike of local transit employees, or of employees of other public utility corporations, were to create a critical situation, the application of the provisions of Sections 206-210 of the federal Act would undoubtedly follow. It is reasonably certain that, if in a large metropolitan and industrial community such as Milwaukee,⁸ a strike in a public utility would seriously affect the normal commercial and industrial life of the area, such situation would have such national repercussions that the tests of the federal Act would be met. It is not likely that federal intervention will be withheld merely because the immediate incidence of the dispute falls most heavily on a particular local area.⁹ In our highly integrated and

⁷ In 1948 there were 187,919 private passenger automobiles registered in Milwaukee County; in 1949 this figure increased to 212,580. **Motor Vehicle Registration List, Wisconsin Motor Vehicle Department (1948, 1949).**

⁸ The population of the City of Milwaukee as of April 1, 1950, was 632,651; that of Milwaukee County, 863,937. **Bureau of the Census, Department of Commerce, Preliminary Counts, Series PC-2, No. 38 (1950).**

In terms of value added by manufacture, metropolitan Milwaukee accounts for a substantial percentage of this country's total in various fields: engines and turbines, 11.4%; construction and mining machinery, 7.9%; general industrial machinery, 3.2%; metalworking machinery, 2.7%; electrical machinery, 2.7%; special industrial machinery, 2%; leather and leather products, 3%. **Census of Manufacturers (1947), United States Department of Commerce, Vol. I, General Summary, Table 2, and Vol. III (Wisconsin), Table 5 (1947).**

Milwaukee is considered generally as the leader, or among the leaders, in the production of automobile frames; heavy lubricating equipment; steam shovels; dredges; cement machinery; hydraulic units; water pumping, ice-making and refrigeration machinery; diesel and gas engines; automobile electrical controls; tinware and enamelware; and cranes and hoists. **Bruce, Short History of Milwaukee (Bruce Publishing Co., Milwaukee, 1936); Facts About Milwaukee, 1941-1942 (Milwaukee Sentinel).**

⁹ Under the general powers of the President, sixteen Fact-Finding Boards were appointed between 1945 and 1950. Among the disputes handled in this manner were two local utility disputes, including one at the Milwaukee Gas Light Company; five involved single employers. Under the terms of Title II of the Labor Management Relations Act, 1947, eight Boards of Inquiry have been appointed, two of which involved single employers. **Federal Fact-Finding Boards and Boards of Inquiry, United States Department of Labor, Bureau of Labor Statistics (1950).**

complicated economy, any serious economic disruption or danger to health and morals in a local area could very well rise to the rank of national emergency. The broad jurisdiction assumed by the federal Congress, and sustained by this court, not only in the labor-management field but in other fields, is demonstrative of this. Stern, *The Commerce Clause and The National Economy*, 59 Harv. L. Rev. 645 and 683 (1946). If, on the other hand, the community affected were a small one, with little commercial or industrial activities, it is more than likely that the employment relationship involved will be one which does not come within the scope of the federal Act in any of its aspects.

3. Strikes in public utilities occur rarely.¹⁰ In the entire state of Wisconsin there were no more than ten in the last half century. **Polner, Some Aspects of the Recent State Legislation to Prohibit Strikes in Public Utilities**, 45 et seq. (Unpublished study, Department of Economics, University of Wisconsin, 1948). The experience in other states apparently is very much the same since the preponderant majority of the states have not found it necessary to enact such legislation.¹¹ If anything, the Wisconsin type of legislation encourages rather than prevents crucial disputes.

4. Rejection of a particular state legislative scheme so transparently in conflict with national policy does not necessarily preclude the states from taking effective action in those rare situations where the national emergency provisions of the federal law might not be applicable. Since neither the state nor its political subdivisions are con-

¹⁰ "The labor record of utility workers in Wisconsin is so nearly perfect that any attempt to outlaw strikes is making a mountain out of a molehill." F. Larkin, Vice President, Wisconsin Electric Power Company, quoted in the *Milwaukee Journal*, April 3, 1947.

¹¹ Only eleven states have passed some type of legislation dealing with the subject, there being great variation in the pattern of control. See Roberts, *Compulsory Arbitration of Labor Disputes in Public Utilities*, 1 Labor Law Journal 694 (CCH, 1950).

sidered "employers" under the federal law, seizure by the state, in a situation justifying such action, might very promptly result in ouster of federal jurisdiction. See **United States v. United Mine Workers**, 330 U. S. 258.

5. Finally, the state's argument should be made, as it already has been made, to the only forum which may properly consider it—the federal Congress. It is for Congress to weigh this type of argument against what it considers the national interest in matters that are within its competence. To this date, at least, Congress remains convinced that the balance favored the policy and technique expressed in the Labor Management Relations Act, 1947.¹² The legislative history of the Act, congressional debates, and its express provisions, including the grant of right to the states to impose greater restrictions on union security contracts [14 (b)], demonstrate that Congress was completely aware of the states' local problems and further demonstrate that, where Congress felt that greater latitude should be granted to the states, it did so, directly and expressly.

II

THE WISCONSIN LAW IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

From the statement of facts, the literal language of the statute, and the judgment and the decision of the Wisconsin Supreme Court, it is apparent that the Wisconsin law, as construed by the Wisconsin Supreme Court, imposes a previous restraint, absolute in character and unlimited in

¹² American and foreign experience amply support the wisdom of the congressional choice. Gagliardo, *The Kansas Industrial Court* (University of Kansas Press, 1941); Ross, *The Constitutional History of Industrial Arbitration in Australia*, 30 *Minn. L. Rev.* 1, passim (1945); Williams, *Settlement of Industrial Disputes in Seven Foreign Countries*, 63 *Monthly Labor Review* 224 (1940); Taylor, *Government Regulation of Industrial Relations* (Prentice-Hall, Inc., 1948); *The Twentieth Century Fund, Labor and National Defense*, 99 et seq. (1941).

duration, upon the exercise by employees of "concerted activities" for the purpose of collective bargaining. For example: A vote by union members upon a minimum standard of wages and working conditions for which they will not work is in effect an "agreement" to strike, which would encourage employees to quit in concert if such minimum standards were not met. The advocacy at a union meeting (as here) of the adoption of a resolution to strike would be an inducement or encouragement to strike. And, of course, the actual concerted quitting is made a violation. All these acts are punishable as misdemeanors by the Wisconsin Statute.

The Wisconsin law makes the strike in itself an unlawful act. It thus applies, in substance, the conspiracy doctrine to the strike; it makes unlawful the agreement, or advocacy of action when done by two or more in concert, although the action would be lawful if done by any one of them alone.

This legislative abrogation of the right to strike is absolute, without regard to the reasons for, or the ends sought by, the concerted activity, and without regard for the fact that in every other respect the strike is accompanied by perfect obedience to law.

The statute and judgment thus embrace previous restraints on fundamental human liberties which include, but are not limited to, the rights of free speech, public assemblage, freedom of contract, and freedom to dispose of one's labor. **Allgeyer v. Louisiana**, 165 U. S. 578; **Truax v. Raich**, 239 U. S. 33; **Wolff Packing Co. v. Court of Industrial Relations**, 262 U. S. 522; **Stapleton v. Mitchell**, 60 F. Supp. 51 (D. Kans. 1945); **Alabama State Federation of Labor v. McAdory**, 18 So. 2d 810 (Ala. 1944); **Hotel & Restaurant Employees v. Greenwood**, 30 So. 2d 696 (Ala. 1947). See **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184; **Near v. Minnesota**, 283 U. S. 697; **National Labor Relations Board v.**

Jones & Laughlin Steel Corp., 301 U. S. 1, 33; **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, 256; **Hague v. Committee for Industrial Organization**, 307 U. S. 496; **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106, 112; **Thomas v. Collins**, 323 U. S. 516.

In support of the argument that the statute and injunction do **not** deprive of rights under the Fourteenth Amendment to the Constitution of the United States, reliance is placed principally on the cases of **Dorchy v. Kansas**, 272 U. S. 306, and **Wilson v. New**, 243 U. S. 332.

The question in the **Dorchy** case, *supra*, was “not, however, the broad one whether the legislature has power to prohibit strikes,” but rather the narrow one whether the state statute was “unconstitutional as here applied” (p. 309). As there applied, the statute made criminal a strike “to collect a stale claim,” a purpose likened to “extortion” (p. 311). It was under such circumstances that the statement was made that “Neither the common law nor the 14th Amendment, confers the absolute right to strike” (p. 311). The necessary inference is that while the Fourteenth Amendment does not protect the right to strike in all circumstances, it does protect the right to strike in some.

Viewed in proper context, then, all that the court said in the **Dorchy** case, *supra*, was that the Fourteenth Amendment does not protect strikes where either the means or objective are unlawful.

By contrast, in the instant case the state restrained a call to strike and the strike itself, absent any evidence of impropriety in the method of calling the strike and present only the lawful purpose of improving wages, hours and conditions of employment. This was done as part of a statutory scheme designed to prevent all strikes in certain enumerated types of businesses and to compel the set-

tlement of disputes by arbitration under the control and direction of the state.

The validity of such statute and injunction must therefore be considered, as was done in the cases of **Wolff Packing Co. v. Court of Industrial Relations**, 262 U. S. 522 (1923), and **Wolff Packing Co. v. Court of Industrial Relations**, 267 U. S. 552 (1925), in connection with the other provisions of the statute relating to compulsory arbitration. The decision in both those cases was that the legislative scheme could not stand, as applied to both employers and employees, because in violation of the Due Process Clause of the Fourteenth Amendment.

Those cases require the same holding here, since as in the first **Wolff** case, *supra*, "while the worker is not required to work at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him." 262 U. S., at 540. And here, too, workers are deprived "of a most important element of their freedom of labor." 262 U. S., at p. 542.

Respondent seeks to distinguish the holdings of the **Wolff** cases on the basis of the type of industry involved, and cites as more directly applicable to the instant case, the decision in the case of **Wilson v. New**, 243 U. S. 332 (1917). But in the last cited case the federal Congress, confronted with an impending nation-wide crisis, to be precipitated by a strike of all operating employees of virtually all of the railroads of the country, enacted legislation designed to avert such disaster. In so doing, it neither prohibited the threatened strike of the employees nor required arbitration of the dispute. It established a standard eight-hour day as a daily work standard, and directed, for a temporary period, the maintenance of the then existing wages without change because of such reduction in

hours. The right of the Congress so to do under the circumstances then existing was affirmed by this court.

Just six years later, this court stated that its ruling in **Wilson v. New**, supra, "went to the borderline, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster," and it found no justification for "extending the drastic regulation sustained in that exceptional case to the one before us." **Wolff Packing Co. v. Court of Industrial Relations**, 262 U. S. 522, 544 (1923).

As further reason for rejecting the argument that the Kansas legislation was similar to the legislation enacted in **Wilson v. New**, supra, the court said that whether, as claimed by the state, a strike in one packing plant might eventually involve all similar establishments and so produce a food shortage "has not been determined by the legislature but is determined under the law by a subordinate agency, and on its findings and prophecy, owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor." 262 U. S., at p. 542. (As we shall soon show, under the Wisconsin Law the subordinate agency does not make any determination of the possible consequences of the threatened strike but is limited by the law to making a finding of whether there will be an "interruption" of an "essential" service.)

It is also suggested by respondent, relying on a statement of this court in **Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.**, 335 U. S. 525, 536, that the **Wolff** cases, supra, have since been overruled by subsequent decisions of this court in cases like **Nebbia v. New York**, 291 U. S. 502; **West Coast Hotel Co. v. Parrish**, 300 U. S. 379; **United States v. Darby**, 312 U. S. 100, and **Olsen v. Nebraska**, 313 U. S. 236. In those cases, however, the court only affirmed the legislative right to regulate businesses upon a proper finding that such legislation was

7

in the public interest; or to establish a minimum level of wages (as contrasted with a fixed wage) legislatively found necessary to protect against evils inherent in the payment of wages below such level. In none of such cases was there conjoined, as here and in the **Wolff** cases, the right to establish **fixed** wages, hours and working conditions of **specific** employees of a **specific** employer, with a restraint on concerted leaving of employment in protest over such governmental directive, absent an emergency of impelling nature.

It is clear that the inability of the Wisconsin law to surmount the obstacle of the Fourteenth Amendment (combining, as it does, anti-strike and compulsory arbitration principles) lies principally in its catch-all definitions of "public utility employer," and "essential service," and in its automatic application of law on occurrence of any "interruption"—a situation far different than that in the case of **Wilson v. New**, *supra*, but similar in all respects to the situation in the **Wolff Packing Co.** cases, *supra*.

Since the Wisconsin law is not carefully confined to situations of actual public danger and peril, but embraces all interruptions of essential services, to sustain such legislation would be to completely nullify the "clear and present danger" test heretofore held to be necessary in balancing the protection "of the great, the indispensable democratic freedoms" afforded by the Fourteenth Amendment against the "dubious intrusions" of the police power of the states. **Thomas v. Collins**, 323 U. S. 516, 530. See **De Jonge v. Oregon**, 299 U. S. 353, 364; **Schneider v. New Jersey**, 308 U. S. 147, 161; **Thornhill v. Alabama**, 310 U. S. 88, 105; **Bridges v. California**, 314 U. S. 252, 263. For, as was stated in the **Thomas** case, *supra*: " * * * any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." 323 U. S., at p. 530.

In the instant case, the state made no showing of clear and present danger, of impending civil disaster, or of conditions imperiling the health, safety or morals of the community. The complaint alleged only that there was a threatened interruption of an essential service (Amended Complaint, Paragraphs 7 and 8, R. 122); that was the only finding made by the Trial Court (Findings of Fact, Paragraphs 7 to 9, R. 153, 154); and the decision of the Wisconsin Supreme Court is based solely on those findings and the statute (R. 166).

That the Wisconsin law is so general and automatic in its application is illustrated by the decision of the Wisconsin Supreme Court in the case of **Wisconsin Telephone Co. v. Wisconsin Employment Relations Board**, 253 Wis. 584, 34 N. W. 2d 844, in which the court sustained an ex parte determination by the Wisconsin Employment Relations Board that the law was applicable to a threatened strike of some 570 non-supervisory employees of the accounting department of the Wisconsin Telephone Co. In assuming jurisdiction under the law, the State Board stated that while there was no assurance that a strike of the clerical employees would or would not result in the interruption of telephone service anywhere in the State of Wisconsin; and although, with the plant and operating departments both working, telephone service would undoubtedly continue for some period of time; nevertheless, because a prolonged strike carries with it the threat of disorder and because picket lines are sometimes infiltrated by "Communists and others of their ilk bent upon stirring up trouble"; therefore, "there is likely to be a stoppage of telephone service and thus an interruption of an essential service."

That type of situation is to be contrasted to the situation in the **O'Brien** case, supra, where Michigan was not permitted to condition the calling of a strike on a majority vote, although the strike would involve not only the major

industry of the City of Detroit but one of the key industries in the United States. Yet, Wisconsin here prohibits strikes in a local transit industry; and has applied its law in other cases to 350 clerical employees of a gas utility (**In re: Milwaukee Gas Light Co. and United Association of Office, Sales and Technical Employees**, Case No. 1767, PU-2, November 7, 1947); and 14 employees of an electrical utility (**In re: Eau Claire Electric Cooperative and International Brotherhood of Electrical Workers, Local No. 953**, A. F. of L., Case No. 2894, PU-22, August 22, 1949).¹³

It is apparent that what Wisconsin has done has been to predetermine by statute that any "interruption", no matter how slight or incomplete, of any broadly defined "essential service", creates an emergency situation sufficient to invoke the drastic provisions of the Wisconsin Act, without any necessity of an investigation or finding by either the executive, legislative or administrative branch with respect to the effect on the public of the particular dispute. A conclusive presumption of "disaster" thus becomes the basis for denial of rights under the Fourteenth Amendment. Such conclusive presumption was applied here to a threatened strike in a local transit system without any evidence of how complete the interruption of the service might be and without any consideration of the possible effects that such strike might have upon the public health and safety.

Section 111.62 of the Wisconsin Statutes further violates the due process clause of the Fourteenth Amendment, because it is so indefinite and vague that it requires working men to speculate at their peril on what acts will result in

¹³ More recently the law was invoked and applied to the picketing of the Wisconsin Telephone Co., a local telephone utility, by employees of a non-public utility employer, engaged in a national strike, because of the refusal of some telephone operators to report to work while picketing was in progress. An injunction restraining such picketing was issued by the Circuit Court for Milwaukee County, based upon Section 111.62. *Milwaukee Journal*, November 16, 1950.

penal sanction. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. **United States v. Brewer**, 139 U. S. 278, 288; **Weeds v. United States**, 255 U. S. 109; **United States v. L. Cohen Grocery Co.**, 255 U. S. 81; **Connally v. General Construction Company**, 269 U. S. 385.

The Wisconsin law fails to meet this test principally because whether or not the contemplated action of the employees will cause an "interruption" within the meaning of the Act is not always ascertainable. Whether a particular strike may cause such interruption will be dependent upon the ease of replacement of striking employees, the nature of the work performed by such employees, and the number of employees who might respond to the strike call.

The Wisconsin law, in Section 111.54, imposes the duty upon the Wisconsin Employment Relations Board to determine in the first instance whether or not a failure to settle the dispute will cause or is likely to cause the interruption of essential service. **Wisconsin Telephone Co. v. Wisconsin Employment Relations Board**, *supra*.

We thus have the peculiar situation that working men are required, before they engage in any concerted activities by way of strike, work stoppage or slowdown, to determine whether or not such activities would cause an "interruption" of an essential service; while, at the same time, the Legislature has recognized that not all of such activities would cause an interruption, and so has placed within the jurisdiction of an administrative agency the power, as well as the duty, to determine whether, in a particular case or under particular circumstances, the interruption would occur.

III

THE WISCONSIN LAW IS IN VIOLATION OF THE
THIRTEENTH AMENDMENT TO THE CONSTI-
TUTION OF THE UNITED STATES

The full and absolute scope of the restraint on concerted leaving of employment under the statute and injunction is apparent on their face (Section 111.62; R. 155). While such injunction continues in force, the employees of the utility, for all practical purposes, cannot enjoy the freedom of labor which the Thirteenth, no less than the Fourteenth, Amendment was intended to assure. For the Thirteenth Amendment is not limited in its application to "African slavery" but "was a charter of universal civil freedom for all persons, of whatever race, color, or estate under the flag. * * * The plain intention was to abolish slavery of whatever name and form and all its badges and incidents." **Bailey v. Alabama**, 219 U. S. 219, 241.

"Slavery" is a harsh word, as is the term "involuntary servitude"; but calling the condition only a restraint on "concert" or "conspiracy" does not make it any more acceptable. Consider the situation of the utility employee: his employer enjoys a monopoly in a particular geographic area. In the course of his employment he has acquired special skills and abilities peculiarly useful to his employer in the narrow field—skills and abilities which have the same or greater value only to another employer in the same field. His individual right to quit means, then, that he must abandon the special skills developed over many years of service and develop new ones if he wants to retain his roots in the community; or he must uproot himself and his family and move to whatever area in which a job may be open with a similar utility monopoly. If the pressure to quit, because of the frustrations of the law, induces many others to do likewise (all being careful not

to discuss their desire or plans with their co-employees lest they commit the crime of instigating, inducing, conspiring, or encouraging) then the limited opportunity to find employment at home or miles away must be divided among all such others and thus further reduced.

* Such situation has all of the "badges and incidents" of slavery. **Bailey v. Alabama**, *supra*. It does not permit the maintenance "of a system of completely free and voluntary labor throughout the United States" and it is one in which " . . . there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition." **Pollock v. Williams**, 322 U. S. 4, 17-18.

Recently, in refusing to hold an injunction² in a labor case as contrary to the 13th Amendment this court stated: "However, nothing in the statute or the order make it a crime to abandon work individually (compare **Pollock v. Williams**, 322 U. S. 4) or collectively." **International Union, United Automobile Workers, A. F. of L., v. Wisconsin Employment Relations Board**, 336 U. S. 245, 251. (Emphasis ours.) The provision of the Wisconsin Statutes and injunction now before the Court does just that. It does make it a crime to abandon work collectively and, for all practical purposes, individually.

While the above quoted expression of the court appears to be the closest it has come to recognizing that restraint on, or criminal punishment of, collective refusals to work fall within the ban of the Thirteenth Amendment, individual members of the Court have made the same suggestion. See Brandeis, J., dissenting, in **Bedford Cut Stone Company v. Journeymen Stone Cutters Association**, 274

U. S. 37.65; Rutledge, J., concurring, in **American Federation of Labor v. American Sash & Door Co.**, 335 U. S. 538, 559.

A number of lower courts have held that such restraint imposes involuntary servitude. **Arthur v. Oakes**, 63 Fed. 310 (C. A. 7, 1894); **Kemp v. Division 241**, 99 N. E. 389 (Ill. 1912); **United States v. Petrillo**, 68 F. Supp. 845, 849 (N. D. Ill. 1946), reversed on other grounds, 332 U. S. 1 (1947).

And this Court has had no hesitancy in recognizing such concerted refusals as the exercise of basic rights, without, however, assigning to either the Thirteenth or the Fourteenth Amendment the role of guardian. **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209; **National Labor Relations Board v. Jones & Laughlin Steel Corp.**, 301 U. S. 1, 33; **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, 256.

It is submitted that to say that one person may protest the conditions under which he works by withholding his services, but that he may not, through his labor organization or otherwise, agree with others to exercise that right in concert would make a sham of the protection afforded by the Thirteenth Amendment.

CONCLUSION

It is respectfully submitted that the Wisconsin statute and the judgment based on such statute are in violation of Article I, Section 8, and Article VI of the federal Constitution because they intrude upon or are in conflict with congressional action in the same field; and are in violation of the Thirteenth and Fourteenth Amendments to the federal Constitution because they impose involuntary servitude and deprive of liberty and property without due

process of law. For these reasons the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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No. 329

SUPREME COURT OF THE UNITED STATES

October Term, 1950

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL, CHARLES BREHM, THOMAS MURACH, RAYMOND KNUTSON, JACK WERY, JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER, PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM BUCHE, GEORGE SLOAN, EDWIN BECKER AND OTHMAR MISCHO,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
WISCONSIN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

OPINIONS BELOW

The opinion of the Circuit Court for Milwaukee County (R. 101-118) is unreported. The opinion of the Wisconsin Supreme Court (R. 163-171) is reported in 257 Wis. 43, 42 N. W. (2) 471.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

QUESTION PRESENTED

May a state, in the exercise of its police power, substitute compulsory arbitration for a strike in a labor dispute between a union and a public utility supplying an essential public utility service where

- (1) the utility's operations are local in character and do not involve the "national health or safety" so as to invoke the "emergency" provision of the Taft-Hartley Act (29 U. S. C. § 180) and where
- (2) pursuant to statute a court of competent jurisdiction has found that a work stoppage by the union in the supply of such essential public utility service will create an emergency resulting in irreparable injury to the citizens of such state.

STATE AND FEDERAL STATUTES INVOLVED

The pertinent state statutes, sections 111.50 to 111.65, Subchapter III of Chapter 111 of the Wisconsin Statutes for 1949 and the pertinent federal statutes, sections 201 to 212 of the Labor Management Relations Act of 1947, 61 Stat. 152-156, 29 U. S. C. §§ 171 to 182 are printed in the appendix.

STATEMENT

The finding of fact in the trial court was that a work stoppage by the union would work irreparable injury to the citizens of Wisconsin.

SUMMARY OF ARGUMENT

I.

To secure the Writ, Petitioner Must Demonstrate that What Wisconsin has Required, in the Light of What Congress Has Ordered Would Make Actual, Not Argumentative, Inroads on what Congress Has Commanded or Forbidden, or Would Truly Entail Contradictory Duties.

II.

The Case at Bar is Determined by the Principle which has Become the Settled Law that only if the Federal Labor Board is Empowered to Act can State Enactment Conflict with Title I of Labor-Management Relations Act of 1947; The Federal Board has not been so Empowered to Act with Respect to Title I.

III.

Petitioner must Demonstrate that the Disputants are in "Commerce", With Respect to Title II of the Federal Act, That the Federal Mediation Service has been Charged with the Administration of Mediation or Conciliation Procedures which in Some Way Conflict with the Conciliation Provision of the Wisconsin Law Under Consideration Here.

IV.

The Due Process Amendment to the Federal Constitution Does not Interdict Prohibitions on Conduct Found to Threaten the Public Health and Welfare with Irreparable Injury.

V.

The Freedom from Involuntary Servitude Guaranteed by the Federal Thirteenth Amendment is an Individual Freedom and the Wisconsin Act Here Expressly Recognizes This Right.

ARGUMENT

I.

To Secure the Writ, Petitioner Must Demonstrate that What Wisconsin has Required, in the Light of What Congress Has Ordered Would Make Actual, Not Argumentative, Inroads on what Congress Has Commanded or Forbidden, or Would Truly Entail Contradictory Duties.

In substance, petitioner contends that the Wisconsin law applies the conspiracy doctrine; this historically was the basic legal weapon for attacking the labor movement as a whole. The decision *In Re Debs*, (1895) 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092, was based on the general ground that union activities interfered with the employer's right to a free and open market and were, therefore, illegal conspiracies in restraint of trade. To state the basis of the doctrine would seem sufficient to eliminate the necessity for serious consideration of the doctrine in the case at bar.

Responding to petitioners' reasons for granting the writ, we consider its first point.

The contention is: Subchapter III of Chapter 111 of Wisconsin Statutes is in conflict with Sections 7 and 13 of the National Labor Relations Act as amended and, there-

fore, in contravention of Article I, Section 8 and Article VI of the Federal Constitution.

Petitioner contends that the decision in *U. A. A. and A. I. W. of A., C. I. O. v. O'Brien*, (1950) 70 S. Ct. 781, 94 L. ed. 659, is completely determinative of the issue. We refer to the O'Brien decision in which, in the words of the Michigan court, the following situation was presented:

"A dispute involving wages arose between UAW-CIO union employees and their employer, the Chrysler Corporation. Resort was had to collective bargaining. The notices required by State and Federal law regulating labor disputes were given and mediation sessions between the respective parties followed. While such sessions were pending the union officers concluded that further mediation would be of no avail and thereupon gave notice to the representatives of the Chrysler Corporation that a strike would be called, and such strike did go into effect on the forenoon of the following day. * * * *International Union, etc. v. McNally*, (1949) 38 N. W. 2d 421, 422.

The unit for which the UAW-CIO was bargaining included Chrysler plants in California and Indiana as well as Michigan.

The O'Brien case arose upon application of Union to strike down procedural inconsistency of Michigan law thwarting Union efforts to comply with explicit mediation procedure of Taft-Hartley provisions.

In the O'Brien case, the validity of one of the procedural provisions of the Michigan Labor Mediation Act was before the court. It was found to be in conflict with the procedural provisions of the National Labor Relations Act of 1935, as amended by the Labor-Management Relations

Act of 1947, 61 Stat. 136, 29 U. S. C. Supp. § 141, 29 U. S. C. A. § 141, et seq., in that the mediation and conciliation provisions of the Federal Act encouraging the peaceful settlement of labor disputes ran their course on a different schedule, or timetable, than their counterpart in the Michigan statute.

As was noted in the opinion, the Congress also set out in detail the procedure in disputes which might create national emergencies, but which, as the opinion stated, did not affect that appellant union. Not noted in the opinion, but of interest here, is Section 203 (b), 29 U. S. C. A. Sec. 173b, which directs the Federal Conciliation and Mediation Service to:

[Sec. 203 (b)]

“* * * avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties * * *”

To comment briefly on the O'Brien decision, we note that it expressly says O'Brien is controlled by the same principle as in *International Union, U. A. W., A. F. of L., Local 232, et al., v. Wisconsin Employment Relations Board, et al.*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651.

II.

The Case at Bar is Determined by the Principle which has Become the Settled Law that only if the Federal Labor Board is Empowered to Act can State Enactment Conflict with Title I of Labor-

Management Relations Act of 1947; The Federal Board has not been so Empowered to Act With Respect to Title I.

To dispose of the petition for the writ it is necessary only to consider *International Union, U. A. W., A. F. of L., Local 232, et al., v. Wisconsin Employment Relations Board, et al.*, supra, in relation to Title I of the Labor-Management Relations Act of 1947, and to consider *UAW-CIO v. O'Brien*, supra, in relation to Title II of the Federal Act. In this process it is essential to distinguish, as did Congress, between the jurisdictional basis provided under Title I and under Title II.

In invoking the commerce clause as to Title I, the term "affecting commerce" has been employed and it is defined in the Act at Section 2 (7), (29 U. S. C. A. sec. 152 (7)) as follows:

[Sec. 2 (7)]

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Under Title I of the Act, the Federal Labor Board is empowered to determine collective bargaining units within the limits of Section 9 (29 U. S. C. A. § 159) of the Act. The Federal Labor Board is also empowered, within the limits of Section 10 (29 U. S. C. A. § 160) to prevent unfair labor practices. Since Section 8 of the Federal Act lists unfair labor practices by both labor and management, the Federal Board is empowered by Section 10 to prevent any person, either labor or management, from engaging in such

unfair labor practices. Section 7 standing by itself raises no serious obstacle to the reserved State power; nor does the Commerce Clause of the Federal Constitution itself. Mr. Justice Brandeis, dissenting, *Duplex Co. v. Deering*, 254 U. S. 443, 488; see also *Dorchy v. Kansas*, 272 U. S. 306, 311, cited with approval, *Thornhill v. Alabama*, 310 U. S. 88, 103; and see *Hotel and Restaurant Employees' Local v. Wisconsin Employment Relations Board*, 315 U. S. 437. Only as Section 7 is implemented and made operative by Sections 8 and 10 do the rights provided for therein arise. Section 8 (a) announces that it is an unfair labor practice for an *employer* to restrain employees in the exercise of the rights guaranteed by Section 7, and Section 8 (b) announces that it is an unfair labor practice for a *labor organization* to engage in certain listed conduct. There follows Section 10 which empowers the Federal Board to prevent *employers* from engaging in the unfair labor practices listed at Section 8 (a) and to prevent a *labor organization* or its agents from engaging in the unfair labor practices listed at Section 8 (b). The empowering section provides:

[Sec. 10 (a)]

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce,
* * *

Accordingly, it is to management conduct that the unfair labor practices of Section 8 (a) relate; it is these that the Federal Board is empowered to prevent; the exercise of the rights of Section 7 are guaranteed against in-

vasion by management by Section 8 (a) and 10 and against invasion by a labor organization by Sections 8 (b) and 10.

A "person" is defined in Section 2 (1) (29 U. S. C. A. § 152 (1)) as follows:

[Sec. 2 (1)]

"The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

We note that neither the term "person" nor the term "employer" in Section 2 (2) (29 U. S. C. A. § 152 (2)) include any State, or political subdivision thereof. The restraint complained of here, of course, does not stem from employer action, but from action by the State, to protect its citizens, not any disputant.

The Federal Labor Board has been given no power to forbid a strike because its method is illegal, even if the *illegality* were to consist of threatened or actual irreparable injury to public health or welfare. Regulation of such conduct is left wholly to the states.

It seems inescapable then, that the remarks of Senator Taft, set forth by petitioner at pages 16 and 17 of its brief, meant precisely what was said by him: "WE (THE SENATE BILL) have done nothing to outlaw strikes * * *." (Emphasis supplied)

Thus, we submit, Section 7 and Section 13, as thoroughly examined in the *Wisconsin Auto Workers case*, and Sections 8 and 10 as similarly studied in *Algoma Plywood Co. v. Wis. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691, have not made otherwise illegal conduct immune from the reserved power of the state, merely because it

is undertaken in concert. And this is particularly true in view of the express holding in the *Wisconsin Auto Workers case*, *supra*, that to contend settled administrative interpretation of the Act by the Federal Labor Board "has irrevocably labeled all concerted activities 'protected' would be in the teeth of the Board's own language and would deny any effect to the Courts of Appeals' decisions. The latter decisions and our own, *Labor Board v. Fansteel Corp.*, 306 U. S. 240; *Southern S. S. Co. v. Labor Board*, 316 U. S. 31; *Labor Board v. Sands Mfg. Co.*, 306 U. S. 332; *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740; and see *Hotel & Restaurant Employees' Local v. Wisconsin Employment Relations Board*, 315 U. S. 437, clearly interdict any rule by the Board that every type of concerted activity is beyond the reach of the states' adjudicatory machinery." (336 U. S. 257)

It seems clear that the doctrine of the sanctity of the strike weapon has been laid to rest ever since this Court's decisions which sustained a state proscribing the use of this form of economic coercion or its overt concomitants where an objective sought thereby was illegal, or contrary to state public policy or contrary to state statute or contrary to the common law of the state or the work stoppage was for an improper purpose or conducted in an improper manner. Beginning with *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490, 69 S. Ct. 684, 93 L. ed. 834, the law has been settled. There this Court was careful to point out that it was within the province of the states "to set the limits of permissible contest open to industrial combatants". Although states can not consistently abridge, within the Federal Constitution, those guaranteed freedoms to obviate slight inconveniences or annoyances, that peti-

tioner recognizes the contingent perils to the public here appears in its brief pp. 18 and 19. Other decisions are: *Algonoma Plywood Co. v. Wis. Board*, supra; *Building Service Employees, etc. v. Gazzam*, 70 S. Ct. 784, 94 L. ed. 653; and *International Brotherhood, etc. v. Hanke*, 70 S. Ct. 773, 94 L. ed. 644. As was said in the *Hanke* case.

[94 L. ed. 650]

"* * * Invalidation here would mean denial of power to the Congress as well as to the forty-eight States."

It has never been seriously contended, irrespective of what a Federal law *could* declare, that any constitutional or moral sanction attaches to the right of industrial combatants to push their struggle to the limits of the justification of self-interest.

III.

Petitioner must Demonstrate that the Disputants are in "Commerce" With Respect to Title II of the Federal Act, That the Federal Mediation Service has been Charged with the Administration of Mediation or Conciliation Procedures which in Some Way Conflict with the Conciliation Provision of the Wisconsin Law Under Consideration Here.

Under Title II of the Act, in invoking the commerce clause, the term "commerce" is used and it is defined in the Act at Section 2 (6), (29 U. S. C. A. § 152 (6)) as follows:

[Sec. 2(6)]

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, * * *."

We note that Congress in spelling out the duties and function of the Federal Mediation and Conciliation Service invokes the commerce clause by using the definition under Section 2 (7) although limiting it by Section 203 (b), but carefully avoids use of this definition in the crisis situation by the use of "commerce" as defined by Section 2 (6), above.

Upon the impasse in collective bargaining and the breakdown of mediation and conciliation in "crisis" situations, the Taft-Hartley Act is not silent. However, it gives no power to the National Labor Relations Board. The Federal Labor Board has been granted absolutely no power whatsoever to participate in crises labor situations; the board can take a secret ballot and certify results to the Attorney General. Because it has no power to act, it can neither investigate, approve nor forbid the union conduct in question.

The amending act, under Title II, (sec. 201 to 212 inclusive are set forth in the appendix) delegates to the Federal Mediation Service, to the Attorney General and to the President the details of the procedures of mediation, conciliation and fact-finding in crisis situations. It abruptly stops short of "occupying the field" in the event these procedures fail to settle the dispute. Rather by Section 210 (29 U. S. C. A. § 180) it provides:

[Sec. 210]

"Upon the certification of the results of such ballot or upon a settlement being reached, whichever hap-

pens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, *the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.*" (Emphasis supplied)

The disputants are then theoretically free from Federal control to exercise their powers of economic coercion.

We submit that, accordingly, no conflict can arise where the Congress has expressly withheld legislation.

In view of the emphasis placed by petitioner upon the restraint as it applies to the very human conduct in union procedure in "speaking up in meeting" for a strike and voting for a strike and announcing an intention to strike, we note in Section 210 (29 U. S. C. A. 180) that the Congress treats a threatened strike and an actual strike or lock-out in a crisis situation as one and the same. See also Section 111.64, Wis. Stat. 1949.

To close this section of our brief we note the contention of petitioner, at page 19 of its brief, that, even in the absence of a conflict between State and federal law, under Section 10 (a) (29 U. S. C. A. § 160 (a)), the State can not acquire jurisdiction unless it is expressly ceded by the Federal Labor Board. We cite *Algoma Plywood Co. v. Wis. Board*, (1949) 336 U. S. 301. There, in referring to Section 10 (a), the court said:

[336 U. S. 313]

"* * * These words must mean that cession of jurisdiction is to take place only where State and fed-

eral laws have parallel provisions. Where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired.

* * *

IV.

The Due Process Amendment to the Federal Constitution Does not Interdict Prohibitions on Conduct Found to Threaten the Public Health and Welfare with Irreparable Injury.

(a) Petitioner contends Subchapter III of Chapter 111, in exempting railroads and railroad employees, in effect creates an improper classification and here results in a denial of equal protection under the Federal Fourteenth Amendment.

The burden is on the person attacking the constitutionality of the statute to show the facts which renders the statute unconstitutional. There is neither pleading nor proof that there are any railroads or railroad employees in the State of Wisconsin that are not engaged in interstate commerce, that they are subject to State regulation. In any event, the burden is on petitioner to show that the classification is arbitrary.

(b) Petitioner contends the Federal Fourteenth Amendment interdicts Subchapter III of Chapter 111 of the Wisconsin Act here considered.

It cites *Charles Wolff Packing Company v. Court of Industrial Relations of the State of Kansas*, (1925) 267 U. S. 552, 45 S. Ct. 441, 69 L. ed. 785, in support thereof. We note that cited in the opinion in the *Wolff Packing Company* case is *Wilson v. New et al.*, (1917) 243 U. S. 332, 37

S. Ct. 298, 61 L. ed. 755. The *Wilson* case involved a public utility, and compulsory arbitration was upheld.

(c) Petitioner contends Subchapter III of Chapter 111 of the Wisconsin Statutes is vague and uncertain and consequently a denial of due process under the Federal Fourteenth Amendment.

The duty to determine whether a work stoppage will create a crisis situation seems properly left to the board, whose determinations are to be given due weight in view of its experience, technical competence, and specialized knowledge.

V.

The Freedom from Involuntary Servitude Guaranteed by the Federal Thirteenth Amendment is an Individual Freedom and the Wisconsin Act here Expressly Recognized This Right.

Petitioner contends Subchapter III of Chapter 111 of the Wisconsin Act under consideration here imposes involuntary servitude in violation of the Federal Thirteenth Amendment.

There is nothing in the act that prohibits any employee from quitting and going home.

The effect of the Act is only that if he does so quit, he can not retain that interest or lien on his employment that is accorded an employee who is lawfully on strike. Whether he chooses to remain at work or to terminate his employment he does it at his own free will.

The Federal Thirteenth Amendment protects individual, not collective rights. *Butler v. Perry*, (1916) 240 U. S. 328.

CONCLUSION

The decision below is correct and there is no conflict of decisions or material constitutional question. We respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Wisconsin Statutes

SUBCHAPTER III.

Public Utilities.

111.50 DECLARATION OF POLICY. It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 DEFINITIONS. When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state; *and shall be deemed to include a rural electrification co-operative association engaged in the business of furnishing any one or more of such services or utilities to its members in this state. Nothing in this subsection shall be interpreted or construed to mean that rural electrification co-operative associations are hereby brought under or made subject to chapter 196 or other laws creating, governing or controlling public utilities, it being the intent of the legislature to specifically exclude rural electrification co-operative associations from the provisions of such laws.* This subchapter does not apply to railroads nor railroad employes. (Italicized matter added by Ch. 37, Laws of 1949)

(2) "Essential service" means furnishing water, light, heat, gas electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin employment relations board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 SETTLEMENT OF LABOR DISPUTES THROUGH COLLECTIVE BARGAINING AND ARBITRATION. It shall be the duty of public utility employers and their employees in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 APPOINTMENT OF CONCILIATORS AND ARBITRATORS. Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the

board by section 20.585 upon such authorizations as the board may prescribe.

111.54 CONCILIATION. If in any case of a labor dispute between a public utility employer and its employees, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employees are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 CONCILIATOR UNABLE TO EFFECT SETTLEMENT; APPOINTMENT OF ARBITRATORS: If the conciliator so named is unable to effect a settlement of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 2 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as

the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 STATUS QUO TO BE MAINTAINED. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action, of either party without the consent of the other.

111.57 ARBITRATOR TO HOLD HEARINGS. (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in disputes. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the

existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The overall compensation presently received by the employees having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employees. The foregoing

enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 STANDARDS FOR ARBITRATION. The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 FILING OF ORDER WITH CLERK OF CIRCUIT COURT; PERIOD EFFECTIVE; RETROACTIVITY. The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit court of the county wherein the dispute arose or where the majority of the employees involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall

continue effective for one year from the date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator. (*Italicized matter added by Ch. 634, Sec. 16, Laws 1949*)

111.60 JUDICIAL REVIEW OF ORDER OF ARBITRATOR. Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the abitrator as to any issue or issues for such further action as the circumstances require.

111.61 BOARD TO ESTABLISH RULES. The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 STRIKES, WORK STOPPAGES, SLOWDOWNS, LOCK-OUTS, UNLAWFUL; PENALTY. It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 ENFORCEMENT. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 CONSTRUCTION: (a) Nothing in this subchapter shall be construed to require any individual employee to

render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a ~~work~~ slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 SEPARABILITY. It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

FEDERAL STATUTES

Labor Management Relations Act of 1947

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements pro-

vision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

SEC. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of \$12,000 per annum. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation

of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish: regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor", approved March 4, 1913 (U. S. C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF THE SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the appli-

cation or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

SEC. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

SEC. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the

expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of \$25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's

statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

◆ (b) Members of a board of inquiry shall receive compensation at the rate of \$50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several

States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a state-

ment by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

COMPILATION OF COLLECTIVE BARGAINING AGREEMENTS, ETC.

SEC. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under

appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

EXEMPTION OF RAILWAY LABOR ACT

SEC. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

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In The

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1950

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL, CHARLES BREHM, THOMAS MURACH, RAYMOND KNUTSON, JACK WERY, JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER, PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM BUCHE, GEORGE SLOAN, EDWIN BECKER AND OTHMAR MISCHO,

v.

Petitioners,

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,

v.

Petitioners,

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCHKE, Individually and as Members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation,

Respondents.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF OF RESPONDENTS
Except The Milwaukee Electric Railway
& Transport Company

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1950

AMALGAMATED ASSOCIATION OF STREET ELECTRIC
RAILWAY AND MOTOR COACH EMPLOYEES OF
AMERICA, DIVISION 998, GEORGE KOECHEL,
CHARLES BREHM, THOMAS MURACH, RAYMOND
KNUTSON, JACK WERY, JOE DERSINZSKI, HOW-
ARD LYNCH, HERMAN WEBER, PAUL BREHM,
PAUL KRAFT, STEVE MALICK, WILLIAM BUCHE,
GEORGE SLOAN, EDWIN BECKER AND OTHMAR
MISCHO,

v.

Petitioners,

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Respondent.

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RAILWAY AND MOTOR COACH EMPLOYEES OF
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v.

Petitioners,

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.
GOODING, HENRY RULE and J. E. FITZGIBBON,
Individually and as Members of the Wisconsin Employ-
ment Relations Board; CARL LUDWIG, H. HERMAN
RAUCH and MARTIN KLOTSCHKE, Individually and
as Members of a Board of Arbitration, and THE MIL-
WAUKEE ELECTRIC RAILWAY & TRANSPORT
COMPANY, a Wisconsin Corporation,

Respondents.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF OF RESPONDENTS
Except The Milwaukee Electric Railway
& Transport Company

OPINIONS BELOW

As to #329

The opinion of the Circuit Court for Milwaukee County (R. 101-118) is unreported. The opinion of the Wisconsin Supreme Court (R. 163-171) is reported in 257 Wis. 43, 42 N. W. 2d 471.

As to #330

The opinion of the Circuit Court of Milwaukee County (R. 101-106) is unreported. The opinion of the Wisconsin Supreme Court (R. 235-237) is reported in 257 Wis. 53, 42 N. W. 2d 477.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

QUESTIONS PRESENTED

As to #329

Whether a state may, by statute and injunction, prohibit strikes by employees of "public utility" employers when such strikes will result in an "interruption of an essential service."

As to #330

Whether a State may by statute require employees of a "public utility" employer to submit disputes regarding contract terms to arbitration when collective bargaining reaches a stalemate and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employees to strike.

STATE STATUTES INVOLVED

The pertinent state statutes, sections 111.50 to 111.65, Subchapter III of Chapter 111 of the Wisconsin Statutes for 1949, are printed in the appendix of petitioner's brief in case No. 320, pages 39-47, hereinafter referred to as "the Wisconsin Statute."

The salient features of the Wisconsin Statute are as follows:

The statute contains a legislative declaration that the injury to the public arising from interruption of public utility service justifies the action taken to protect the general welfare (111.50). It imposes on employers and employees the duty of endeavoring to reach agreement through collective bargaining (sec. 111.52). It authorizes the Wisconsin Employment Relations Board to appoint a conciliator when the bargaining process reaches a stalemate (sec. 111.54) and where an interruption of essential service is likely, authorizes it to appoint arbitrators (sec. 111.55). The arbitrators' award is final (subject to judicial review) and endures for one year (secs. 111.59 and 111.60). Strikes are forbidden and violations are made a misdemeanor (sec. 111.62). The Wisconsin Employment Relations Board is made responsible for enforcement and is authorized to commence an action in circuit court to compel compliance (sec. 111.63).

FEDERAL STATUTES INVOLVED

The federal statutes involved are the Labor Management Relations Act of 1947, 61 Stats. 152-156, 29 U. S. C. Supp. §§171 to 182.

STATEMENT

As to case #329

All of the public passenger-transportation service by the Milwaukee Electric Railway and Transport Company is furnished within Milwaukee County, Wisconsin. (R. 152).

The services of the 2700 employees are essential to carrying out the operation of the Transport Company (R. 153). A strike by the employees would cause interruption of the essential service of the Transport Company and the defendants threaten so to do (R. 153). The conduct of the defendants would work irrevocable injury to the plaintiff board and to the citizens of the State of Wisconsin (R. 154).

The Wisconsin Blue Book, published biennially by the State of Wisconsin shows the 1940 population of the City of Milwaukee to be 587,472; and of the County of Milwaukee to be 766,885.

As to case #330

The Milwaukee Electric Railway and Transport Company, hereinafter referred to as "the company" or "the Transport Company," is a public utility which, since its organization in 1938, has owned and operated all except a few of the streetcar, trolley and motor bus public transportation facilities in the City of Milwaukee (R. 163-164).

This dispute arose over the failure of the parties to agree on a new contract to succeed the previous contract which had been cancelled by the Company pursuant to proper notice, effective midnight December 31, 1948. On January 5, 1949, a work stoppage occurred. The Conciliator first directed his efforts toward securing a resumption

of service. Service was resumed in full the following morning (R. 141).

The Wisconsin Employment Relations Board was of the opinion when it provided for arbitration that the collective bargaining process between the company and the union, notwithstanding good faith efforts on the part of both sides to the dispute, had reached an impasse and stalemate and that such dispute if not settled would cause or would be likely to cause the interruption of an essential service (R. 122).

SUMMARY OF ARGUMENT

The Wisconsin Statute is constitutional because

I. It operates in a limited field in which the National Act has not displaced state regulation.

a. The National Act recognizes the need for procedure for limiting strikes which create a public emergency. By its silence as to public emergencies which are less than national, it has left this field to the State.

b. The National Act does not prevent the State's protecting its citizens from interruption of public utility services. The State may still protect its citizens from interruption which endangers public health, safety and welfare.

c. In this special field, the National Act does not prevent the State from substituting compulsory arbitration for the alternative of a strike when collective bargaining breaks down.

- d. The O'Brien decision is not decisive of this case.
 - e. Nothing in the Wisconsin Statute condones unfair labor practices which are unlawful under the National Act. The Wisconsin Statute does not prevent the National Labor Relations Board from performing its functions.
- II. The Wisconsin Statute does not violate the due process clause of the 14th Amendment.
- III. The Wisconsin Statute does not impose involuntary servitude.

ARGUMENT

I.

THE WISCONSIN STATUTE OPERATES IN A LIMITED FIELD IN WHICH THE NATIONAL ACT HAS NOT DISPLACED STATE REGULATION.

- (a) The National Act recognizes the need for procedure for limiting strikes which create a public emergency. By its silence as to public emergencies which are less than national, it has left this field to the State.

Congress recognized that the breakdown of collective bargaining may occur notwithstanding the rights guaranteed and duties imposed by the National Act. It recognized that such a breakdown may affect the public interest so greatly that there must be a special procedure for preventing a strike. Thus Congress recognized a separate segment of the field of labor relations, the segment where grave

public danger results when the collective bargaining process breaks down. This recognition is shown by the enactment of Secs. 206-210 of the National Act which provides that when, in the opinion of the president, a strike or lock-out affecting an entire industry or substantial part thereof imperils the national health or safety, he may take certain steps leading to an injunction against a strike or lockout. No provisions were made, however, for the same type of situation which is less than national in scope. It therefore follows that when a strike or lockout imperils health or safety in a community, Congress has not prevented the state from protecting the community by imposing limitations on a strike or by prohibiting it altogether.

In adopting the National Act, Congress was concerned with "industrial strife which interferes with the normal flow of commerce," "full production of articles and commodities for commerce," the "full flow of commerce" and "labor disputes affecting commerce." Sec. 1 of Labor Management Relations Act, 1947 and Sec. 1, National Labor Relations Act as amended.

Congress dealt with the problem of protecting the free flow of commerce from the effects of industrial strife. Nowhere in the Act is it suggested that it intended to deal with, or foreclose a state from dealing with, the problem of protecting a community from the interruption of public utility service which occurs when a labor dispute erupts into a strike.

The two problems are distinct. In the general field with which Congress dealt, an interruption of the business of an employer immediately and directly affects only the employer, the employees and their families. Ultimately the effect will be felt by those who rely on the employer

as a customer or supplier and those who rely on the employees as customers, but the rate at which this happens will vary. It is true that the community where the dispute occurs will also be affected by a continued strike, but it is rare that a strike of one or a few days' duration will have a substantial effect upon the community.

In the specific public utility field, however, an interruption of service immediately, directly and substantially affects almost every activity of the community where it occurs. It immediately injures many who are not parties to the dispute. In the case of the utility here concerned, school children, shoppers, business, professional and factory workers and all who rely on public transportation service are affected the day the interruption occurs. Interruptions in gas, electric, water or telephone service have effects of similar scope.

Congress has not said expressly that the state has no power to evaluate and deal with the latter problem in a situation otherwise subject to the National Act. Is such a prohibition to be implied? It does not appear that Wisconsin's solution to the specific problem will disrupt or conflict with the federal scheme. It is our contention that the legislature had powers to prohibit strikes which would cause interruption of essential public utility service and compel arbitration where the collective bargaining process has reached a stalemate.

In the absence of pre-emption by Congress the States may regulate the labor relations of industries engaged in operations affecting commerce. See *Algoma Plywood Co. v. Wis. Board*, 336 U. S. 301, 69 S. Ct. 584; *Auto Workers v. Wis. Board*, 336 U. S. 245, 69 S. Ct. 516; *LaCrosse Telephone Corp. v. Wis. Board*, 336 U. S. 18, 69 S. Ct. 379; *Allen-*

Bradley Local 1111, United Electrical Radio and Machine Workers of America et al. v. Wisconsin E. Rel. Bd., 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154.

- (b) The National Act does not prevent the State's protecting its citizens from interruption of public utility services. The State may still protect its citizens from interruption which endangers public health, safety and welfare.

The special status of public utility services has long been recognized. The State grants certain privileges to those who engage in rendering services recognized as public utilities. The State has the power to insist that those who enter the public utility field continue to render the service. One of the characteristics of the State's permission to render public utility service is that the State excludes others from rendering the same service. Thus, those who are engaged in rendering public utility services would, if allowed to interrupt service at their will, have an unusual opportunity to do damage to the public. The public does not have the protection which in other fields arises from the fact that if one supplier of a commodity or a service stops business, those same commodities or services are available to some degree at least from competitors.

Various Wisconsin Statutes impose requirements on public utilities. Chapter 193, Wisconsin Statutes, contains regulations of street railways and, among other things, requires that lines shall be extended and service furnished as ordered by a commission. Sec. 193.10. Chapter 196 contains regulations of telephone, heat, light, water, gas and power utilities and requires that reasonably adequate service and facilities be furnished. Sec. 196.03.

It was said in *Wisconsin E. R. Board v. Amalgamated Asso.*, (1949) 257 Wis. 43, 47-48:

"* * * The operations of public utilities have long been subject to scrutiny by regulatory bodies set up by the state to protect the rights of the public. Among the details of their operations subject to regulation are the right to engage in or to discontinue operations, the type and amount of service to be rendered, expansion programs, the type and amount of securities to be issued, rates to be charged, accounting systems and the amount of depreciation permitted to be charged off. In ordinary commercial enterprises these matters are left to management. On the other hand, utilities are granted certain privileges by law, such as the elimination of most competition and the right of eminent domain. Persons who invest their savings in the securities of a public utility know their capital is subjected to the regulation and control of the state. They must weigh the advantages against the disadvantages in determining in what type of enterprise they will invest. Management and investors alone cannot operate a public utility. There must be natural persons employed to give it life. All are part of one organization which is subject to control by the state. So persons seeking employment must weigh the advantages and disadvantages of employment by public utilities. There are many advantages to this type of employment: There is generally a continuity of employment in the public-utility field; the state has not been adamant in refusing higher rates when necessary to improve service and working conditions or to bring wages to a standard comparable to wages in other lines of endeavor; the public, too, has been generous in its acceptance of higher rates when they are necessary to pay utility employees suitable wages; utilities may not cease operations nor lock out employees."

Nowhere has it been held that the National Act creates an alienable right to strike which may not be prohibited by state law. *Auto Workers v. Wisconsin Board*, 336 U. S. 245, 69 S. Ct. 516, *Dorchy v. Kansas*, 272 U. S. 306, 311, 47 S. Ct. 86, 87, 71 L. ed. 248.

The National Act itself in sec. 8(b)(4)(A)(B)(C) and (D) prohibits four different kinds of strikes.

In *Algoma Plywood & Veneer Co. v. W. E. R. B.*, 336 U. S. 301, 69 S. Ct. 584 decided on March 7, 1949, the supreme court held that the States were not prevented from characterizing certain types of employer conduct as unfair Labor Practices by Section 10(a) of the National Labor Relations Act which states:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be *exclusive*, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." [Emphasis supplied.]

This decision was reached in spite of the union's contention that Section 10(a) made Section 8 the exclusive standard as to what constituted unfair labor practices and that thereby the states were precluded entirely from characterizing other types of employer conduct as unfair labor practices. See also *Phelps-Dodge v. N. L. R. B.*, (1941) 313 U. S. 177, 61 S. Ct. 845, 85 L. ed. 1271.

The danger and inconvenience caused by interruption of services of a public utility operating wholly within one state is primarily a local and intrastate problem. Therefore in the absence of federal legislation clearly displacing state authority the state should be free to deal with the

problem even though the operations of the utility may have some effect on interstate commerce. *Maurer v. Hamilton*, 309 U. S. 598, S. Ct. , 84 L. ed. 969.

Our position is based on the rule that in the absence of legislation by Congress inconsistent therewith, the states may regulate local matters even though interstate commerce may be involved or affected. There are many cases supporting this rule, frequently denominated the "Cooley formula," some of them being as follows:

Cooley v. Wardens, (1851) 12 How. (53 U. S.) 299, 13 L. ed. 996;

Port Richmond Ferry Co. v. Board, (1913) 234 U. S. 317, 34 S. Ct. 821, 58 L. ed. 1330;

Pennsylvania Gas Co. v. Public Service Commission, (1920) 252 U. S. 23, 40 S. Ct. 279, 64 L. ed. 434;

Kansas Natural Gas Company v. Kansas, (1924) 265 U. S. 298, 44 S. Ct. 544, 68 L. ed. 1027;

Kelly v. Washington, (1937) 302 U. S. 1, 58 S. Ct. 87, 82 L. ed. 3;

Parker v. Brown, (1942) 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315;

Bob-Lo Excursion Co. v. Michigan, (1948) 333 U. S. 28, 68 S. Ct. 358, 92 L. ed. 455, 463-464.

In *Cooley v. Wardens*, (1851) 12 How. (53 U. S.) 299, at pages 315-316, the court considered the effect of the commerce clause on the power of the Pennsylvania legislature to regulate boat pilots. The court said:

"That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed

by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the constitution."

~~The argument~~ contrary to our proposition is based on the *O'Brien* case, which should be distinguished, see (d) *infra*.

Our contention is that the determination must rest on an analysis of each case; that the proper test is whether the state requirements relate to essentially "local" matters and the regulation may, as a practical matter, be carried on by the state without materially impairing the national interest.

In *Prudential Ins. Co. v. Benjamin*, (1945) 328 U. S. 406, 66 S. Ct. 1142, 90 L. ed. 1342, in the course of discussing permissible limits of state regulation or taxation over interstate commerce, it is said (p. 1355):

"* * * For, concurrently with the broadening of the scope for permissible application of federal authority, the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than

dogmatic logistic. These facts are of great importance for disposing of such controversies." [Emphasis ours]

In *United States v. South-Eastern Underwriters Assn.*, (1943) 322 U. S. 533, 64 S. Ct. 1162, 88 L. ed. 1440, Mr. Justice Black, in delivering the opinion of the court, observed (p. 1454):

"* * * And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid." [Emphasis ours]

Page 1456:

"The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition."

In *Parker v. Brown*, (1943) 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315, the opinion of the court written by Mr. Chief Justice Stone, states (pp. 332-333):

"* * * When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. (cases cited).

o "Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' * * * not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. (cases cited) There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it."

- (c) In this special field, the National Act does not prevent the State from substituting compulsory arbitration, for the alternative of a strike when collective bargaining breaks down.

In enacting the Wisconsin Statute, the legislature chose to place a higher value upon preventing the inconvenience and danger to the general public resulting from a cessation of essential public utility services than upon the complete freedom of employees to bargain over the terms of employment, with a strike, or the concerted withholding of personal services, as the employee's alternative to agreeing to terms they consider undesirable. Compulsory arbitration was deemed by the legislature to be a desirable means of settling disputes which reach a stalemate, and evidently the legislature felt that the substitution of this alternative in the place of labor's alternative of a strike was justified because of the high public value it placed upon continuity of essential services.

Attention is respectfully directed to the declaration of policy contained in sec. 111.50:

"It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases

where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare."

We submit that the Wisconsin legislature was within its powers in prohibiting strikes in public utilities and providing for compulsory arbitration in the event of a stalemate in the collective bargaining process.

At the outset it must be remembered that the Wisconsin Statute does *not* provide that as to public utilities compulsory arbitration shall completely *replace collective bargaining*. See secs. 111.50 and 111.52. Even after an arbitration order has been made it may be replaced at any time by an agreement of the parties. It is only when the collective bargaining process breaks down that the Wisconsin Employment Relations Board is authorized to step in and apply the conciliation and arbitration procedures. That compulsory arbitration is substituted for the alternative of a strike we do not deny, but we do deny that this procedure is in conflict with the National Act.

Applying the principle previously stated in this argument, that in cases of concurrent power over commerce State law remains effective so long as Congress has not manifested an unambiguous purpose that it should be supplanted, one looks in vain at the National Act to see where Congress has manifested such a purpose insofar as state

laws providing for the settlement of labor disputes in public utilities by compulsory arbitration is concerned.

The National Act doesn't purport to go as far in the settlement of labor-management disputes in public utilities as the Wisconsin Statute does. It by no means follows that thereby the States are powerless to provide additional means of settling labor disputes to those found in the National Act. It is recognized in Section 203 (b) of the National Act itself that the Federal Act is not to wholly supplant State conciliation services. To adopt the argument of counsel for the union that the States may not go further than the National Act in the settlement of labor disputes in public utilities is to read limitations in the Act which do not appear there and which Congress manifested no intention to place there. It is to deny the power of the States to take action to avert industrial conflict that may have disastrous effect upon local communities but which does not create a national emergency so as to warrant the application of the injunction provisions of the National Act.

Though collective bargaining is encouraged by the National Act, it is not thereby made an inalienable right which it is beyond the power of the States to replace, under certain emergency conditions, with means for the settlement of labor disputes which a legislature deems more effective. It is the particular kind of emergency conditions, local in character, which are created by a strike in a public utility with which the Wisconsin Statute deals, and which we submit is an area left open under the National Act for the application of State law. Therein lies the reason why there is no conflict on the question of compulsory arbitration between the National Act and the Wisconsin Statute.

(d) The O'Brien decision is not decisive of this case.

Petitioners rely heavily on the decision in *International Union v. O'Brien*, 339 U. S. 454, 94 L. ed. (Adv. Op. 659), May 8, 1950. The court held invalid a Michigan statute prescribing certain conditions precedent to a lawful strike which are different from the conditions prescribed by the National Act. This court decided that there was thus a conflict.

The situation presented by the Wisconsin Statute is very different. It does not attempt to regulate strikes generally as does the National Act. It does not attempt to prescribe prerequisites for a strike as does the National Act.

The Wisconsin Statute is limited to a type of industry where an interruption of service by its very nature directly, immediately, and substantially damages vital interests of the public in the particular community where the utility is located. Its prohibition against strikes and lockouts which will cause an interruption of essential service nor its provision of compulsory arbitration where collective bargaining has reached a stalemate is not an attempt to exercise concurrent jurisdiction with Congress over the general field of labor management relations. The Michigan statute imposed a pattern different from the National Act on a subject covered by the National Act. Both the Michigan statute and the National Act were directed at the broad public interests in maintaining peaceful industrial relations and in avoiding interruption in commerce and industry generally. The Wisconsin Statute prohibits conduct which injures the community in a direct, immediate and specific manner, by depriving it of essential public utility service.

Congress has not dealt with the problem except where the public emergency is national in scope.

The New Jersey court held that its public utilities disputes act, which forbids those strikes against public utilities which might imperil health and welfare, does not conflict with Labor-Management Relations Act, distinguishing *International Union, etc. v. O'Brien*, (1950) 339 U. S. 454, 70 S. Ct. 781, 94 L. ed. 659. Referring to the O'Brien case, the New Jersey Court said in *New Jersey Bell Tel. Co. v. Communication W. etc.* (1950), — N. J. —, 75 Atl. (2d), p. 727:

"In that case the constitutionality of the strike vote provision of the Michigan labor mediation law was questioned. The Union had struck against a private industrial organization, engaged in interstate commerce, without conforming to the prescribed state procedure; the state procedure differed from that provided in the Federal legislation and the court decided that because of the conflict the state statute was unconstitutional. The court said that the regulation of the right to peacefully strike for higher wages had been preempted by Congress, but the case being decided by the Court involved a statute regulating the right to strike against private industry. It was not a statute such as the New Jersey statute, in which a state, in the exercise of its sovereignty, seeks to maintain without interruption the supply of services, considered essential to the welfare and health of its people, being furnished by a public utility, operating under a franchise by the state, whose services furnished are primarily intrastate. It is significant that in the O'Brien case, *supra*, the court said 'Even if some legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the Federal Act.' Our examination of the Federal Act discloses no provision therein which

prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested,' *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 (1942) we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been preempted by Congress, and that the *O'Brien* case, *supra*, is inapplicable to the present situation.

- (e) Nothing in the Wisconsin Statute condones unfair labor practices which are unlawful under the National Act. The Wisconsin Statute does not prevent the National Labor Relations Board from performing its functions.

As to public utility employes and their unions, the rights and duties guaranteed and imposed by the National Act may exist side by side with the restrictions imposed by the Wisconsin Statute. The National Board may fully exercise its functions without conflict with the Wisconsin Statute. The Wisconsin Statute affirmatively supports the requirement of collective bargaining as does the National Act. Nothing in the State Act can in any way affect or prejudice the right of employes to organize as set forth in Sec. 7 of the National Act. The Wisconsin Statute does not expressly nor by implication purport to make lawful the unfair labor practices described in Sec. 8. The National Board may proceed with its determination of bargaining units and representatives and may prevent unfair labor practices without any hindrance or embarrassment arising out of the existence of the Wisconsin Statute.

CONCLUSION TO PART I.

Because the Wisconsin Statute operates only in the field of strikes and lockouts insofar as they would cause an interruption in an essential service in a public utility and thereby protect the members of the community from an emergency directly affecting health, safety and welfare, the Wisconsin Statute does not supplant the National Act in a field where the National Act would take precedence if

there were conflict. Congress has not acted to provide rules for a situation where a strike or lockout creates a serious local public emergency. The State may still exercise its power over such situations.

II.

THE WISCONSIN STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT

The grounds for the petitioners' attack under heading II of their brief are not clear. Petitioners assert that the Wisconsin Statute does "thus embrace previous restraints of fundamental human liberties which include but are not limited to the rights of free speech, public assemblage, freedom of contract and freedom to dispose of one's labor." Freedom for the individual to cease or to continue his work for a public utility employer is expressly protected by the Wisconsin Statute. Sec. 111.64. If he continues or commences such work after the passage of the Wisconsin Statute, he then accepts the express condition which attaches to such employment. He may voluntarily continue in such employment with the condition that he may not join with others in ceasing work with resulting interruption in an essential service. He is free as an individual, however, to give up his work as a public utility employe. It may also be that petitioners challenge the provisions of sec. 111.62 on the ground that they prohibit strikes in public utilities but do not prohibit employees from quitting their work singly, apparently on the theory that this is a discrimination against concerted action which denies privileges and

immunities to persons acting jointly which are accorded to persons acting individually. It would seem clear enough that a distinction between concerted action and individual action is based on a real and substantial difference germane to the purpose of the act; because the objective of the concerted action is obviously coercive and designed to interrupt essential service when individual action could not be. Such an argument is no more logical than it would be to argue that a city ordinance requiring a permit to be obtained before routing a parade through city streets is discriminatory because no permit is required for an individual to walk through the streets by himself.

In *France Packing Co. v. Dailey*, (C. C. A. 3rd, 1947) 166 F. 2d 751, the Circuit Court of Appeals pointed out that there is a wide distinction between a worker quitting his job for any reason and no reason, and cessation of production by workers who seek to win a point. The court said:

"The contention that a limitation of the right to strike under the specified narrow conditions of Section 8 partakes of involuntary servitude is not substantiated by the cases. To the contrary, there is a wide distinction between a worker quitting his job, for any reason or no reason, on the one hand, and a cessation of production by workers who seek to win a point from management, on the other hand.

"* * *

"In brief, the restricted limitation of the right to strike, in this Act, refers to circumstances involving a continuing master and servant relationship. There is no involvement here with the distinct—and unquestioned—right of the worker to quit his job or the right of the employer to discharge him for cause. In this situation we fail to see any true constitutional question in this case." (pp. 753, 754)

Similarly in *State v. Traffic Tel. Workers Fed. of New Jersey*, (1948) 61 A. 2d 570, 575:

"The Union next argues that whatever is lawful for one man to do, is lawful for several to do in concert; individual employees may quit their jobs at pleasure, therefore they may 'strike' in concert. The major premise is generally true in the absence of legislation to the contrary, but it is not true when the Legislature, acting within the wide range of its powers, prohibits such concerted action. A strike is a concerted cessation of work, intended to disrupt the business of the employer, and thereby induce him to act in a manner desired by the strikers. It has, and is intended to have, an entirely different effect from that produced by individuals acting independently, who resign their employment. The State does not have to ignore this difference. It can properly forbid such concert of action when the effect would be to disrupt essential services of a public utility, especially where it is found by the Governor that the cessation of operations will seriously injure the public interest. The Union suggests that there is an inherent or constitutional right to strike, a right beyond the reach of the State. I know of no such right when the strike will cause great injury to the public. In my opinion, the adoption of the Union's view in this respect might lead to national disaster."

If the appellants' contentions with respect to discrimination are based on the fact that the law applies only to public utilities and not to other industries, that is a distinction which has for many, many years been uniformly regarded as warranting a difference in treatment.

Munn v. Illinois, (1876) 94 U. S. 113, 24 L. ed. 77.

See, also, *Wilson v. New*, (1916) 243 U. S. 332, 352-354, 61 L. ed. 755, 37 S. Ct. 298, where it is said:

"(b) *As to the employee.* Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied and the resulting right to fix in case of disagreement and dispute a standard of wages as we have seen necessarily obtained.

"In other words, considering comprehensively the situation of the employer and the employee in the light of the obligations arising from the public interest and of the work in which they are engaged and the degree of regulation which may be lawfully exerted by Congress as to that business, it must follow that the exercise of the lawful governmental right is controlling. This results from the considerations which we have previously pointed out and which we repeat, since conceding that from the point of view of the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference, that right in no way affects the law making power to protect the public right and to create a standard of wages resulting from a dispute as to wages and a failure therefore to establish by consent a standard. The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative

power does not exist to protect the public interest from the injury resulting from a failure to exercise the private right. * * *

Even if it be conceded that Congress went to the borderline in the case of *Wilson v. New*, certainly the legislature is well within that borderline in the instant case, because there is no question that it is dealing with public utility regulation as Congress did in *Wilson v. New*. That is the distinction between *Wolff Packing Co. v. Court of Industrial Relations*, (1925) 267 U. S. 552, 69 L. ed. 785, 45 S. Ct. 441, cited by appellants, and the case of *Wilson v. New*. In the former, the regulation was made applicable to competitive industry operating under the system of free enterprise, whereas in the case of *Wilson v. New* the court dealt with a public utility. The type of legislation involved in the instant case is fully as much of "the temporary emergency type of legislation" as that dealt with in the case of *Wilson v. New*.

The fact that the wage rate in *Wilson v. New* was fixed in a statute would make it no less a deprivation of constitutional rights than if it were fixed by administrative tribunal. If the legislation there involved did not infringe constitutional rights, it follows that the Wisconsin Statute does not infringe such rights.

To find that the Wisconsin Statute violates the rights of freedom of speech and of assembly would require an unwarranted extension of the definition of those rights. This court rejected a similar attempt at extension in *Lincoln Union v. Northwestern Co.*, 335 U. S. 525, 69 S. Ct. 251, 93 L. ed. 212. In the same case the court discussed its change in view concerning the limitations of the due process clause as applied to state legislation. It said:

"In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."

If attempt should be made to apply the law in a case where the extent of public interest does not warrant the regulation, the question must be considered in that case—not here. In the instant case the transportation service provided by the respondent employer and its employees is the only one available in a community of half a million or more people. Certainly that is "an essential public service" of such great importance to the many people dependent upon it as to warrant special legislative treatment.

Petitions also argue that the Wisconsin Statute is indefinite and vague.

No criminal law, however, could be so precisely framed that there could never be a question as to its applicability to particular circumstances near the border line.

In the case of *Nash v. United States*, (1913) 229 U. S. 373, 376, 33 S. Ct. 780, 57 L. ed. 1232, Mr. Justice Holmes, speaking for the court, said in upholding a statute prohibiting contracts and combinations in restraint of trade:

"Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute

contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court. *Tozer v. United States*, (52 Fed. 917, 919.)

"But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw' [citing cases]."

Certainly the statute there involved was far less susceptible of precise definition by the layman than the one involved in the instant case.

It is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even of caution, provided that there is sufficient warning to one bent on obedience, that he comes near the prescribed area. *Nash v. United States*, *supra*; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 S. Ct. 853, 58 L. ed. 1284; *State v. Evjue*, 253 Wis. 146.

In the case of *Wisconsin E. R. Board v. Amalgamated Asso.* (1949), 257 Wis. 43, 50-52, in answering the contentions of the union that it and its members were denied the constitutional right of free speech and the right to assemble for common good and to petition the government and that the statute is so vague and indefinite that its application is in violation of due process of law, the court said:

"The rights guaranteed by both the federal and state constitutions are individual rights, and they are not absolute. In *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722, 725, 62 Sup. Ct. 807, 86 L. Ed. 1143, it was stated:

'Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this court is plain. Whenever state action is challenged as a denial of "liberty," the question always is whether the state has violated "the essential attributes of that liberty." Mr. Chief Justice HUGHES in *Near v. Minnesota*, 283 U. S. 697, 708. While the right of free speech is embodied in the liberty safeguarded by the due process clause, that clause postulates the authority of the states to translate into law local policies "to promote the health, safety, morals, and general welfare of its people. . . . The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise." *Ibid* at 707.'

"The prohibitions of the statute under review are against the actions of more than one individual when acting in concert. We cannot see that any individual

rights are infringed upon. If there is such infringement, it must be recognized that it is in recognition of the paramount rights of the public. The United States supreme court recognized this in the case of *International Union v. Wisconsin E. R. Board*, supra, p. 259, when it stated:

'This court less than a decade earlier had stated that law [National Labor Relations Act] to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice BRANDEIS that "Neither the common law, nor the Fourteenth amendment confers the absolute right to strike," *Dorchy v. Kansas*, 272 U. S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. *Duplex Co. v. Deering*, 254 U. S. 443, 488. This court has adhered to that view.'

"Mr. Justice FRANKFURTER also stated this rule in *Carpenters Union v. Ritter's Cafe*, supra, p. 728, as follows:

'We hold that the constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the state to set the limits of permissible contest open to industrial combatants." *Thornhill v. Alabama*, 310 U. S. 88, 103.'

III.

THE WISCONSIN STATUTE DOES NOT IMPOSE
INVOLUNTARY SERVITUDE

It was said in *Wisconsin E. R. Board v. Amalgamated Asso.*, (1949) 257 Wis. 43, 52:

"The contention that the legislation is unconstitutional because it imposes involuntary servitude is answered by the language of the statute itself. Sec. 111.64, Stats., reads as follows:

'Construction. (a) Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employees of a public-utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public-utility employer to lock out his employees, where such acts would cause an interruption of essential service:

'(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.'

"Instead of being subject to involuntary servitude the employees of public utilities enjoy certain advant-

ages, such as continuity of employment, that were mentioned above."

No case has been cited holding that legislative limitations on strikes violate the Thirteenth Amendment of the Constitution. Decisions by the federal courts are to the contrary. The statute upheld in *Dorchy v. Kansas*, (1926) 272 U. S. 306, 47 S. Ct. 86, 71 L. ed. 248 was one which made it a crime to "induce others to quit their employment for the purpose and with the intent to hinder, delay, or suspend the operation" of enumerated industries. The statute there involved was a broad one, not limited to public utilities as in the instant case.

In the case of *France Packing Co. v. Dailey*, (C. C. A. 1948) 166 F. 2d 751, the Court of Appeals for the Third Circuit held that legislative limitations on the latter do not even present a constitutional question under the Thirteenth Amendment; because the right to strike is quite different from the right of the individual worker to quit his job, and it is the latter with which the Thirteenth Amendment is concerned.

The case of *State ex rel. Hopkins v. Howat*, (1921) 109 Kan. 376, 25 A. L. R. 1210, 198 Pac. 686 is another in which a law restricting strikes was upheld. Writ of error was dismissed by the United States Supreme Court in *Howat v. Kansas*, (1922) 256 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277.

The U. S. Supreme Court has tacitly recognized that there is no constitutional objection to an injunction restraining a union and its officials from encouraging workers to interfere with production by strike or cessation of work. See *United States v. United Mine Workers of America*, (1947) 330 U. S. 258, 91 L. ed. 884, 67 S. Ct. 677.

The District Court of the Northern District of Illinois considered the question expressly in *Western Union Tel. Co. v. International B. of E. Workers*, (1924) 2 F. 2d 993, 994, affirmed 4th C. C. A., 6 F. 2d 644, 46 A. L. R. 1538; certiorari denied 285 U. S. 630, 76 L. ed. 536, 52 S. Ct. 13, in which an injunction against striking was upheld against attack on constitutional grounds. The court said:

"As to clause 1 of the prayer for a temporary injunction it is said that it prevents employees from ceasing to work, and therefore imposes involuntary servitude upon them. The right to cease work is no more an absolute right than is any other right protected by the Constitution. Broadly speaking, of course, one has the right to work for whom he will, to cease work when he wishes, and to be answerable to none unless he has been guilty of a breach of contract. But the cessation of work may be an affirmative step in an unlawful plan. One may not accept employment intending thereby to quit work when that act will enable him to perform one step in a criminal conspiracy. * * * These defendants are under no compulsion to accept employment on buildings where plaintiff's equipment is being installed; and, if they do accept it they are not permitted to make an unlawful use of it. * * *

See, also, the decision of the United States Supreme Court in *Southern S. S. Co. v. National Labor Relations Board*, (1942) 316 U. S. 31, 62 S. Ct. 836, 86 L. ed. 246, in which it recognized the right of Congress to make unlawful a seamen's strike even when the boat was docked.

Legislation has been upheld prohibiting strikes in hospitals and charitable institutions, which endanger public health.

Elizabeth Gen. Hosp. and Dispensary v. Elizabeth Gen. Hosp. Employees, et al., 4 Labor cases, par. 60,590 (N. J. Ct. of Chancery 1941);

Western Pennsylvania Hospital v. Lichtler, (1941) 340 Pa. 382, 17 A. 2d 206;

Society of New York Hospital v. Hanson, 59 N. Y. S. 2d 91, (Sup. Ct. 1945);

Beth-El Hospital, et al. v. Robbins, (1946) 10 Labor Cases par. 62,944, 60 N. Y. S. (2d) 798.

Bailey v. Alabama, (1910) 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145 and *Pollock v. Williams*, (1944) 322 U. S. 4, 88 L. ed. 1095, 64 S. Ct. 792, cited by petitioners, involved statutes which, in effect, punished refusal to continue in the service of creditors. The instant case does not require anyone to continue in the service of another.

The provision quoted from *Holden v. Hardy*, 169 U. S. 366, 397, 42 L. ed. 780, 18 S. Ct. 383, was written in upholding the validity of state legislation limiting the hours of work in mines, which was challenged as abridging the rights of both employer and employee to make their own contracts. It had no relation to the question of strikes. Indeed, the same excerpt might be used to sustain the legislative regulation here involved as providing a means of enforcing reasonable standards against employers.

Striking is not the exercise of an individual right but rather the imposition of a coercive economic weapon. As such the right to engage in strikes even in the absence of legislative restriction was in serious doubt under the common law, and many jurisdictions held that strikes were unlawful even though they had a legal objective. Other jurisdictions concluded that if strikes were justified by a

legal objective they were not unlawful *per se*; but even such jurisdictions recognize that the coercive nature of the activity requires proper justification which would not be true of the exercise of an individual right protected by the constitution.

Even if a constitutional right were involved, it might be surrendered by contract or by entering a field of operation where the public interest has been recognized as so extensive as to warrant special regulation as in the case of public utilities. The type of regulation imposed in this state upon utilities would probably be in violation of the Fourteenth Amendment if it were to be applied in restriction of property rights in businesses not so classified. The case of *Wilson v. New*, (1916) 243 U. S. 332, 61 L. ed. 755, 37 S. Ct. 298 points out that the same standard applies to employees who enter service in a public utility as applies to other types of utility regulation.

No question of constitutionality was involved in *American Steel Foundries v. Tri-City Central T. Council*, (1921) 257 U. S. 184, 42 S. Ct. 72, 66 L. ed. 189. That case dealt with the permissible extent of injunctions under the Clayton Act and involved primarily statutory interpretation.

The case of *National Labor Relations Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 has nothing to do with constitutionality of legislation curbing strikes.

None of the cases cited by the appellants support their contention that the constitution forbids legislation curbing strikes. Argument that it is desirable economically that employees should have the right to strike is not for the courts but should be addressed to the legislature, because

that is the body which weighs and chooses among conflicting economic theories.

We do not believe that the sponsors of the constitutional provision against slavery and involuntary servitude ever contemplated that the provision should prevent legislatures from dealing with the strike as a coercive weapon, when it infringes upon important public services.

The following excerpts from *Carpenters' Union v. Ritter's Cafe*, (1943) 315 U. S. 722, 724, 62 S. Ct. 807, 86 L. ed. 1143, applies to the type of legislation under consideration:

"The right of the State to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted * * *. But the petitioners now claim that there is to be found in the due-process clause of the fourteenth amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community in order to protect the general interest, that the States must be powerless to confine the use of this industrial weapon within reasonable bounds.' "

After discussing the precise limitation placed by the Texas court upon the picketing of respondent's restaurant, Mr. Justice Frankfurter then said:

"We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that the "rights of employers and employees to conduct their economic affairs and to combat with others for a share in the products of industry are subject to modification or qualification in the interests of

the society in which they exist. This is but an instance of the power of the State to set the limitation of permissible contest open to industrial combatants." "

CONCLUSION

It is respectfully submitted that the Wisconsin Statute and the judgment based thereon do not violate the federal constitution by reason of any intrusion upon or conflict with congressional action with respect to labor and management relations; that neither is the Wisconsin Statute in violation of the 13th or 14th Amendments of the federal constitution. For these reasons, it is respectfully submitted that judgment of the supreme court of Wisconsin herein should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1950

Nos. 329-330

AMALGAMATED ASSOCIATION OF STREET, RAIL-
WAY AND MOTOR COACH EMPLOYEES OF AMER-
ICA, DIVISION 998, ET AL.,

PETITIONERS,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

BRIEF FOR STATE OF MICHIGAN AS

AMICUS CURIAE

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BRIEF FOR STATE OF MICHIGAN AS

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Following decision by this Court in *International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O. et al. v. O'Brien, et al.*, 339 U.S. 454, the Legislature of Michigan amended the title and certain sections of Act No. 176 Public Acts of Michigan of 1939, as amended, dealing with the mediation of labor disputes [§ 423.1 et seq. Compiled Laws of Michigan 1948, § 15.454 (1) et seq. Michigan Statutes Annotated (Henderson) 1949 Cum Supp] and added ten new sections by Act No. 230 Public Acts of Michigan 1949 [§ 423.2 et seq. Com-

piled Laws of Michigan 1948, § 17.454 (2) et seq. Michigan Statutes Annotated (Henderson), 1949 Cum Supp.]

§ 13a (1) of said Act 230 Public Acts of Michigan 1949 provides:

“In case of any labor dispute involving hospital or public utility employes the following procedure shall be followed.

“(2). Disputes for which a settlement procedure is provided in a collective agreement between a hospital or public utility employer and a labor organization shall be handled in accordance with such procedure, or, if such procedure does not terminate in voluntary arbitration or does not result in settlement, then in accordance with the procedure provided in subsection (3) of this section.

“(3). Disputes concerning wages, hours, or other terms or conditions of employment, or concerning the interpretation or application of a collective agreement, which are not settled pursuant to the procedure, if any, provided for such settlement in a collective agreement or in a separate agreement between a hospital or public utility employer and a labor organization, shall be handled and settled in accordance with the following procedure:

“(a). The board shall intervene and investigate such dispute to determine whether the parties have engaged in collective bargaining as herein defined. The parties to a hospital or public utility dispute shall be obligated under this act to bargain collectively at all times. The parties shall be under a further obligation to participate actively and in good faith in the mediation of such dispute by the board.

“(b). The board shall also, if at any time it concludes that the parties may not be able to settle their disputes by bargaining, mediation and conciliation, urge upon the parties that they submit the same to arbitration pursuant to section 9d of this act. If, within 30 days following the notice to the board, the dispute has not been resolved, or submitted to voluntary arbitration, the board forthwith shall certify such dispute to the governor.

“(c). The governor shall cause the dispute to be submitted to a special commission as provided in section 13b of this act.”

Sections 13b, 13c, 13d, 13e, 13f, and 13g of said Act No 230 Public Acts of Michigan, 1949, covers appointment and procedure of the special commission, hearings, powers of commission, provisions governing evidence, report filed with Governor, changing wages during proceedings, unlawful conduct, injunction, and penalty. These sections are printed in the appendix.

The Supreme Court of Michigan in the case of *Local 170, Transport Workers Union of America v. Genesee Circuit Judge*, 322 Mich 332, held that the provision of the statute creating a board for compulsory arbitration of labor disputes, of which a circuit judge shall be a member and the chairman, was void and unconstitutional as an attempt to confer upon a judicial officer nonjudicial powers and duties in violation of the provisions of the Constitution requiring a separation of the powers of government. In this case while not necessary to decision Mr. Justice Bushnell comprehensively discusses the basic issues involved in public utility strikes and we invite this Court's attention to the scholarly discussion of the deep issues involved where strikes occur in the public utility field.

By constitutional provision in Michigan municipalities may own and operate public utilities. Article VIII, § 23, Constitution of Michigan 1908, Vol 1 Michigan Statutes Annotated (Henderson) page 391, reads as follows:

“Subject to the provisions of this constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof; and may also sell and deliver water, heat, power and light without its corporate limits to an amount not exceeding twenty-five per cent of that furnished by it within the corporate limits; and may operate transportation lines without the municipality within such limits as may be prescribed by law: *Provided*, That the right to own or operate transportation facilities shall not extend to any city or village of less than twenty-five thousand inhabitants.”

About eighteen cities and villages in Michigan own and operate electric light plants or artificial gas plants, See

Bay City v. Bd of Tax Administration, 292 Mich 241, 245.

Cities are municipal corporations, deriving their powers from the State—State agencies for carrying on local municipal government, but within the range of the Constitution and the general home rule act for cities. The electors thereof may make, alter, amend, revise or repeal the charter of the city, which is the organic law of the city, and to be considered as other organic acts are considered. *Streat v. Vermilya*, 268 Mich 1.

As said by the Supreme Court of Michigan in the case of *City of Kalamazoo v. Titus*, 208 Mich 252, 261:

“Political experiment has not yet produced, in this State, the autonomous city, — a little State within the State. We have a system of State government and the right of local self-government is, and always has been, a part of the system. We have, as we have always had, a State Constitution, the fundamental law. By it, now, as formerly, the legislative power of the state and all of it, is reposed for exercise in a legislature; save only as reserved by referendum and initiative proceedings.”

Strikes in municipally owned utilities in Michigan would not create a national emergency but would strike the local citizenry a fatal blow and leave them hanging on the ropes. Strikes in privately owned utilities would have the same effect. As said in *International Union of U. A. & A. v. O'Brien, et al.*, supra (94 L ed 659) headnote 2:

“The field of regulation of peaceful strikes for higher wages is occupied, and closed to concurrent state regulation, by the National Labor Relations Act, as amended by the Labor Management Relations Act (29 USC §§ 141 et seq.), which expressly recognizes, qualifies, and regulates the right of strike, establishes certain prerequisites for any strike over contract termination or modification (§ 8 (d) of Labor Management Relations Act), including notices to both state and Federal mediation authorities, forbids strikes for certain objectives, and details procedures for strikes which might create a national emergency (§ 8 (b) (4) of Labor Management Relations Act).”

While sweeping claims will be made in the briefs of amici curiae to be filed in the case at bar that the decision in the

above case bars all State action in the public utility field, public or private, it is our view that this Court never intended any such result.

We like the approach of I. Herbert Rothenberg, Lecturer of Labor Law, Dickinson School of Law in the Article "What Should Be Done About Emergency Strikes," Vol LIV, No 4, Dickinson Law Review, June, 1950, 361 at p 364:

"There can be no question that a certain strike may be classed as an emergency strike per se, with or without the benefit of executive grace. Such a strike need not be of national proportions nor need it concern the welfare of the nation as such or of any substantial part of the nation. No one could doubt that the shutting-off of the entire water supply of whole communities by a strike of employees of a privately owned waterworks would constitute a real and living emergency. Would the absence of presidential proclamation or the inapplicability of the Taft-Hartley Act's definition (Title 11, Section 206: 'a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof' which 'will, if permitted to occur or continue, imperil the national health or safety',) render such an insufferable circumstance any the less an 'emergency' to the residents of the community whose first essential of life has been seized from them? Even though the strike might cross common boundary of two contiguous states and thus involve *commerce*, it would hardly fall within an honest and untortured interpretation of the act. It would therefore not fall within the act's connotation of an *emergency* strike. But would this render the actual emergency to the communities' residents any the less dangerous or acute. Nor could one persuade the seven and a half million citizens of

a metropolis like the City of New York that the paralysis of their community by a transportation strike is no *real* emergency because the language of the Taft-Hartley Act doesn't fit the circumstances neatly enough."

And the same author at p 387 Id., says:

"Concerning the constitutionality of a measure requiring obligatory arbitration, there is ample reason to suppose that legislation which is mechanically proper would be held to be constitutional. (New Jersey Laws 1947, Chapter 38, which was declared unconstitutional in the case of *State of New Jersey v. Traffic Telephone Workers' Federation of New Jersey, et al.*, 16 Labor Cases para. 65, 162, 2 N. J. 335 (1949) for faulty legislative craftsmanship. The statute, however, was amended, so that this defect was cured, by the Act of 1949, Public Laws Chapter 308. In the case of *Local 170, Transport Workers Union, et al. v. Gadola*, 15 Labor Cases para 64, 725, 322 Mich 332 (1948) a Michigan Statute requiring obligatory arbitration in labor disputes in public utilities was declared unconstitutional because of unwarranted delegation of legislative functions to the judiciary.) The invalidation of these local statutes was not predicated upon any asserted invasion of fundamental constitutional guarantees. In light of the latter-day awareness of the Supreme Court of the acuteness of the labor problem (*Gibboney v. Empire Storage & Ice Company*, 336 U.S. 490) and remembering the effective role which Congressional declaration of public policy played in the recognition of the constitutionality of such legislation as the Anti-Injunction Act, the Wagner Act, the Fair Labor Standards Act and the Taft-Hartley Act, it is not unreasonable to assume that a statute which was mechanically

acceptable and which would preface the requirement of obligatory arbitration by an adequate Congressional declaration of public policy would be declared and held to be constitutional."

Donald R. Richberg in Vol 19, Labor Relations Reference Manual, Case for Restriction of Strikes by Law, 143 at p 144, puts it this way:

"It should be generally agreed that, where voluntary agreements cannot be reached and ~~unsettled~~ labor disputes in public utilities threaten a serious stoppage of an essential service, the parties should be required by law to submit their controversy to the binding decision of an impartial public tribunal. There should be little objection from the managers and owners of public utilities since their rates, services, and accounting are regulated by law and they are not at liberty to abandon their public obligations. There can be no sound objection from employees who are intelligent enough to understand that when they rely upon a public utility for their livelihood the public has a right to rely upon them to make every reasonable effort to maintain continuous service.

"There is no involuntary servitude which would result from denying men a right to strike. Each employee is at liberty as an individual to quit his job. He cannot be compelled to work against his will. A strike is the concerted action of employees who do not intend, or wish, to leave their employment, but who are seeking to compel the employer to continue their employment upon what they regard as more advantageous terms. When the employer is practically the agent of the public, authorized by government to render a public service, a concerted effort to compel him to yield to

private demands is almost exactly on a par with a strike of government employees against their government.”

For another timely article on the question of “Compulsory Arbitration of Labor Disputes in Public Utilities” see *Labor Law Journal*, Vol 1, No 9, June, 1950, p. 694.

With the public holding the bag where strikes in public utilities occur, compulsory arbitration even though generally undesirable, may be justifiable. These industries supply services of vital importance to the public. In most cases the individual utility companies enjoy local monopoly, so that a strike in a particular locality will deprive the public of that locality of the services provided by the utility. A utility company has the duty of continuous operation, except where operation is impossible without continual loss, and the utility is willing to surrender its franchise entirely. *Brooks-Scanlon Co v. Railroad Comm.*, 251 U. S. 396; *Bullock v. Railroad Comm.*, 254 U. S. 513. It is certainly neither arbitrary nor unreasonable to impose on the employees of such a company a duty not to quit work in concert, but to allow their disputes to be settled by compulsory arbitration. In such a case the legislature may well say, as Mr. Justice McKenna said in *Wilson v. New*, 243 U. S. 332, 364, that:

“... submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest.”

See, *Compulsory Arbitration*, 38 *Harvard Law Review*, 753, 776.

Conclusion

As said in *Queenside Hills Realty Co v. Sarl*, 328 U. S. 80, protection of the safety of persons is one of the traditional uses of the police power of the States and that the police power is one of the least limitable of governmental powers. If the States are to continue to perform their historic function of protecting the public welfare by on the spot alertness where grave danger to public health, peace and safety is involved, notwithstanding that in some cases the question of interstate commerce may be present, *National Labor Relations Board v. Kentucky Utilities Co.*, 182 F2d 810, legislation of the type enacted in Wisconsin and other States seeking to protect the public health and safety of their citizens affected by a strike in the public utility field should be sustained.

For a recent State approach to this delicate problem
See

New Jersey Bell Telephone Co v. Communication Workers of America, New Jersey Traffic Div. No 55, CIO [New Jersey Superior Court, App Div., August 8, 1950,] and unofficially reported in 75 A2d 277-284.

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APPENDIX

Appendix

Pertinent sections of Act No 230 Public Acts of Michigan, 1949, § 423.2 et seq. Compiled Laws of Michigan, 1948, § 17.454 (2) et seq. Michigan Statutes Annotated (Henderson) 1949 Cum Supp.

Sec. 13b. A special commission under this act shall consist of 3 disinterested persons designated by the governor and 2 non-voting members 1 to be selected by each party to the dispute, to act with respect to a labor dispute. Such commission shall proceed promptly to conduct public or private informal hearings in said dispute, at which the parties shall appear and be heard, following such hearings, and in any case within 30 days after its appointment or such additional time as the governor may allow, the commission shall make written findings and recommendations with respect to the issues in the dispute, and report such findings and recommendations to the governor. A majority vote of the members of the commission shall constitute the recommendation of the commission on any matter. Such findings and recommendations shall not be binding upon the parties, but shall be made public. The costs and expenses of such a commission proceeding, including a per diem fee of \$50.00 and necessary expenses for each member of the commission, shall be paid out of the general fund.

Sec. 13c. Reasonable notice of such hearings shall be given to the parties, who shall appear and be heard either in person or by counsel or other representative. Hearings shall be informal, and the rules of evidence prevailing in judicial proceedings shall not be binding. Any oral or documentary evidence and other data deemed relevant by the special commission may be received in evidence. A

transcript of the proceedings shall be taken, and for this purpose the mediation board shall supply the necessary stenographic service.

Sec. 13d. The special commission appointed under section 13b of this act shall have the power to administer oaths, require the attendance of witnesses, and the production of such books, papers, contracts, agreements, and documents as may be deemed by the special commission material to a just determination of the issues in dispute, and may for such purpose issue subpoenas. If any person shall refuse to obey such subpoena, or shall refuse to be sworn or to testify, or any witness, party or attorney is guilty of any contempt while in attendance at any hearing held hereunder, the special commission may, or the attorney general if requested shall, on its behalf invoke the aid of any circuit court within the jurisdiction of which the hearing is being held, and such court shall have jurisdiction to issue an appropriate order. Any failure to obey such order may be punished by the court as a contempt thereof.

Sec. 13e. (1). The special commission in making its report and recommendations shall consider only the evidence in the record and shall be governed by the following:

(a). When a valid contract is or was in existence defining the rights, duties, and liabilities of the parties with respect to any matter in dispute, the special commission shall have power, as to such matter, only to determine the proper interpretation and application of the relevant contract provisions;

(b). When there is no contract between the parties, or when there is a contract, but the issues, or any of them, have arisen with respect to a new contract or an amendment of an existing contract which, with respect to such

issues, is subject to reopening and has been duly reopened, the standards, if any, which have been stipulated by the parties as properly controlling with respect to any such issues shall be applied. In the absence of such stipulation, the special commission shall make just and reasonable findings and recommendations.

(2). The report and recommendations of the special commission shall be filed with the governor, together with the complete record in the case. The governor shall forthwith make such report and recommendation public and deliver a true copy of such report and recommendation to the board and to each of the parties, and the complete record shall be filed with the board. The parties shall thereupon, and for a period of 10 days following the filing with the governor of the report of the special commission, resume collective bargaining, and shall in good faith attempt to settle their disputes by this means, with the assistance of the board, and the board shall again urge the parties voluntarily to submit such disputed issues as may remain unsettled to arbitration under section 9d of this act. In the event the parties shall not reach an agreement or submit to arbitration within this period, the board shall thereupon certify this fact and the issues remaining unsettled to the governor.

Sec. 13f. During the pendency of proceedings under sections 13a to 13e hereof, existing wages, hours, and other terms and conditions of employment shall not be changed by action of either party without the consent of the other.

Sec. 13g. It shall be unlawful for a hospital or public utility employer to engage in or continue a lockout, or for a labor organization to engage in or continue a strike or other work stoppage, slowdown, or other attempt to interrupt a hospital or public utility service, before the proceed-

ings provided in sections 13a to 13e of this act have been completed, or where the same is applicable, before completion of the procedure contained in section 9c. At the request of the governor, the attorney general shall, on behalf of the people, petition any circuit court having jurisdiction for appropriate injunctive relief with respect to any such unlawful conduct. An employer or labor organization which engages in conduct in violation of such injunction shall, upon conviction thereof, be deemed guilty of contempt of court and be punished by a fine of not more than \$10,000.00 for each day during which such violation occurs or continues, and any officer or agent of such employer or labor organization who instigates, aids, or abets such violation shall be subject to a fine of not more than \$1,000.00 or by imprisonment for not more than 6 months, or by both such fine and such imprisonment: Provided, That nothing in this act shall be construed to require an individual employee to continue rendering labor or service without his consent or to make illegal the quitting of his employment, and no court shall have power to issue any process to compel any such employee to continue to render such labor or to remain at his place of employment without his consent.

Sec. 24. Any person who shall conspire with 1 or more other persons to violate any of the provisions of this act, violation of which is made a penal offense hereunder, shall upon conviction thereof, be deemed guilty of a misdemeanor, and punished by a fine of not to exceed \$1,000.00, or by imprisonment of not to exceed 6 months, or both.

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In The
Supreme Court of the United States
OCTOBER TERM, 1950

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Nos. 329-330.
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**AMALGAMATED ASSOCIATION OF STREET, RAIL-
WAY AND MOTOR COACH EMPLOYEES OF
AMERICA, DIVISION 998, ET AL., Appellants,**

V.

**WISCONSIN EMPLOYMENT RELATIONS BOARD,
Appellee.**

— :: —
**BRIEF FOR STATE OF NEBRASKA AS
AMICUS CURIAE.**
— :: —

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Attorney General of Nebraska,
BERT L. OVERCASH,
Assistant Attorney General of Nebraska,
Amicus Curiae.

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— :: —
**BRIEF FOR STATE OF NEBRASKA AS
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Attorney General of Nebraska,
BERT L. OVERCASH,
Assistant Attorney General of Nebraska,
Amicus Curiae.

— :: —
In 1920 the people of Nebraska adopted a new
Constitution and authorized the Legislature of Ne-
braska to create an Industrial Commission to settle
strikes "in any business or vocation affected with a

public interest." The constitutional implementation, Article XV, Sec. 9, reads as follows:

"Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission."

Acting under this authority as well as the power bestowed in Article V, Sec. 1, to create "other courts inferior to the supreme court", the Legislature of Nebraska in 1947 established the Court of Industrial Relations. (Laws of Nebraska 1947, Chapter 178, page 585; R. S. Nebraska, 1949 Supp., Sections 48-801-823.)

The second section of this act declared the following "public policy of the State of Nebraska":

"(1) The continuous, uninterrupted and proper functioning and operation of the governmental service including governmental service in a proprietary capacity and of public utilities engaged in the business of furnishing transportation for hire, telephone service, telegraph service, electric, light, heat or power service, gas for heating or illuminating, whether natural or artificial, or water service, or any one or more of them, to the people of Nebraska are hereby declared to be essential to their welfare, health and safety. It is contrary to the public policy of the state to permit any substantial impairment or suspension of the

operation of governmental service, including governmental service in a proprietary capacity or any such utility by reason of industrial disputes therein. It is the duty of the State of Nebraska to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils, calamities, or catastrophes which would result therefrom. It is therefore further declared that governmental service including governmental service in a proprietary capacity and the service of such public utilities are clothed with a vital public interest and to protect same it is necessary that the relations between the employers and employees in such industries be regulated by the State of Nebraska to the extent and in the manner hereinafter provided;

“(2) No right shall exist in any natural or corporate person or group of persons to hinder, delay, limit, or suspend the continuity or efficiency of any governmental service or governmental service in a proprietary capacity of this state, either by strike, lockout, or other means; and

“(3) No right shall exist in any natural or corporate person or group of persons to hinder, delay, limit, or suspend the continuity or efficiency of any public utility service, either by strike, lockout, or other means.”

Section 10 of the Act provides:

“All industrial disputes involving governmental service in a proprietary capacity or service of a public utility shall be settled by invoking the jurisdiction of the Court of Industrial Relations.
* * *

The first section of the Act makes it plain that public power and irrigation districts, which encom-

pass, the entire State of Nebraska to the exclusion of all private power companies, as well as other public utilities, are subject to the Act.

“(3) The term ‘governmental service in a proprietary capacity’ shall mean and include any service performed under employment in any public utility, or commercial or business enterprise, which is owned, managed or operated by the State of Nebraska, any political or governmental subdivision thereof, any public corporation, or any public power district or public power and irrigation district.

“(4) The term ‘public utility includes any individual, partnership, association, corporation, business trust, or any other organized group of persons, which carries on an intrastate business in this state and over which the government of the United States has not assumed exclusive regulation and control, that furnishes transportation for hire, telephone service, telegraph service, electric light, heat and power service, gas for heating or illuminating, whether natural or artificial, or water service, or any one or more thereof.”

Section 3 creates “an industrial commission to be known as the Court of Industrial Relations”; and other portions of the Act, with reference to procedure, hearings and penalties are reviewed and printed in the appendix of this brief.

No case from the Industrial Court has yet been reviewed by the Supreme Court of Nebraska, although jurisdiction has been exercised by the Industrial Court in a number of cases.

We submit that the general language in *International Union of U. A. & A. v. O'Brien, et al.*, 70 S. Ct. 781, 94 L. Ed. 659, which is seized upon by appellants, was not intended to determine and foreclose the authority of States to protect citizens against the "calamities or catastrophies" which would inevitably result from strikes of essential public services in the public utility field. No such question was presented in the O'Brien case, and earlier decisions of this court under the Labor Management Relations Act of 1947, as well as prior legislation, clearly preserve to the states authority to exercise control in this field.

International Union, U. A. W., et al. v. Wisconsin Employment Relations Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651, like the O'Brien case, *supra*, involved a private business as distinguished from a public utility. In considering "state action in relation to both Federal Acts" (National Labor Relations Act and Labor Management Relations Act) in the former case, this court held:

"Congress has not seen fit in either of these Acts to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control. * * * (93 L. Ed. 662).

"* * * However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.' *Allen-Bradley Local, U. E. R. M. W. v. Wisconsin Employment Relations Bd.*, 315 U.

S. 740, 749, 750, 86 L. Ed. 1154, 1164, 1165, 62 S. Ct. 820. We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case.

"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. The Labor Management Relations Act declared it to be an unfair labor practice for a union to induce or engage in a strike or concerted refusal to work where an object thereof is any of certain enumerated ones. Sec. 8 (b) (4), 61 Stat. 140, 141, c. 120, 129 U. S. C. A., Sec. 158 (b) (4), 9 F. C. A., title 29, Sec. 158 (b) (4). Nevertheless the conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner. While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. * * * (93 L. Ed. 662-3).

"* * * And Sec. 13 plus the definition only provides that 'Nothing in this Act * * * shall be construed so as either to interfere with or impede' the right to engage in these activities. What other Acts or other state laws might do is not attempted to be regulated by this section. Since reading the definition into Sec. 13 confers neither federal power to control the activities in question nor any immunity from the exercise of state power in reference to them, it can have no effect on the

right of the state to resort to its own reserved power over coercive conduct as it has done in this instance.

"If we were to read Sec. 13 as we are urged to do, to make the strike an absolute right and the definition to extend the right to all other variations of the strike, the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slow-down and perhaps the sit-down strike as well. Cf. *Allen-Bradley Local, U. E. R. M. W. v. Wisconsin Employment Relations Bd.* 315 U. S. 740, 751, 86 L. Ed. 1154, 1165, 62 S. Ct. 820. * * * (93 L. Ed. 668).

"We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effects on that interstate commerce which Congress may regulate. *National Labor Relations Bd. v. Jones & L. Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352; *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U. S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026." (93 L. Ed. 669).

It is well settled that there is not and cannot be any constitutional right to "trial by combat" in the public utility field.

Int. Union v. Wisconsin Employment Relations Board, supra (93 L. Ed. 662);

Carpenters and Joiners Union v. Ritters Cafe, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143.

Nothing in the legislative history of the Labor Management Relations Act indicates any intention to exclude states from continuing to perform their historical function in the public utility field except in those cases where an "entire industry or a substantial part thereof" sustains a strike which "will imperil the national health or safety" (29 U. S. C. A., Sec. 178).

The remarks of Senator Taft, referred to in the O'Brien decision, supra, as well as other legislative comment with reference to the public utility field all relate to proposed action by the federal government. The fact that the "Government" did not itself wish to enter upon "fixing wages" and "price fixing" in the utility field, does not mean that any intention was thereby manifested to occupy the field exclusively and prohibit all such state action. The further fact that the federal government did not wish to set up a labor court to consider and resolve all controversies in the utility field does not supply a legal basis for restraining state action by implication.

The attitude of Congress in this matter is consistent with the actualities of the situation and recognizes that price and rate making in the utility field is quite largely performed at the state level and therefore to the extent that regulating strikes involves rate making, the function logically belongs and should be left with the states. In Nebraska the State Railway Commission constitutes the utilities regulating agency and has constitutional as well as statutory authority.

Constitution of Nebraska, Art. 4, Sec. 20,

R. S. Nebraska 1943, Chapters 74, 75, 86, Ar-

ticle 3 of Chapter 70 and Article 5 of Chapter 54.

The silence of the congressional act as to strikes in the utility field involving less than the "national health or safety" constitutes a recognition of state authority. No "cession of jurisdiction" was necessary, since as stated in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U. S. 301, 69 S. Ct. 584, 93⁹ L. Ed. 691:

"Where the State and federal laws do not overlap, no cession is necessary because the States jurisdiction is unimpaired." (93 L. Ed. 702).

The present situation is well described by certain language in *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 62 S. Ct. 491, 86 L. Ed. 754:

"* * * Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. * * *." (86 L. Ed. 762).

This was the view expressed by this court as to the *National Labor Relations Act in Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234:

"In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences arise. It has dealt with the subject of relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee re-

lation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state. * * *." (91 L. Ed. 1245).

The foregoing views conform to the strict standards set by this court in determining whether state statutes are superseded by federal acts. *People v. Breen*, 326 Mich. 720, 40 N. W. (2d) 778, quotes from 15 C. J. S. Sec. 15, on this point as follows:

"* * * the exercise by the state of its police power, which would be valid if not superseded by federal action in the regulation of interstate commerce, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled nor consistently stand together." (page 275).

"To have the effect of superseding a state statute, it is not sufficient that a congressional regulation of commerce invades the same field; it must expressly cover the precise subject matter, or show a purpose to take legislative possession of the whole field, or at least a purpose to legislate on the particular subject, or an intention to supersede or exclude state action; and this purpose must be manifested by a valid statute." (page 274; 40 N. W. [2d] 779, 780).

To the same effect:

Allen-Bradley Local No. 1111 v. Wisconsin E.

R. Board, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154;

Kelly v. Washington, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3;

Ill. Central R. Co. v. Public Utilities Comm.,
245 U. S. 493, 38 S. Ct. 170, 62 L. Ed. 425.

In order for state legislation to fail there must be an actual and "irreconcilable conflict" with specific federal enactments.

Hill v. Florida, 325 U. S. 538, 65 S. Ct. 1373,
89 L. Ed. 1782;

*Bethlehem Steel Co. v. New York State Labor
Rel. Board*, 330 U. S. 767, 67 S. Ct. 1026,
91 L. Ed. 1234.

Our contentions as to the O'Brien decision and the effect of federal legislation have been sustained recently by the Supreme Court of New Jersey in the matter of arbitration between *New Jersey Bell Tel. Co. and Communication Workers of America*, (October 10, 1950) — N. J. —, 75 Atl. (2d) 721. On the claim of federal preemption of the field the opinion states:

"The Company's first contention is that the statute is unconstitutional because it invades a field preempted by the Federal Government through the enactment of the National Labor Relations Act, 29 U. S. C. A., Sec. 151, *et seq.*, and the Labor-Management Relations Act, 1947, 29 U. S. C. A., Sec. 141, *et seq.* This question was fully explored and disposed of by this court in *Van Riper v. Traffic Telephone Workers Federation of N. J.*, 2 N. J. 335 (1949), wherein we decided that our State statute was not in conflict with Federal legislation. The Company argues, however, that since our decision on this point in the *Van Riper* case, *supra*, the United State Supreme Court, in *International Union of U. A. A. & A. v. O'Brien*, — U. S. —, 94 L. Ed. (Adv. Op.) 659 (May 8, 1950), had decided that the right

to strike peacefully for higher wages is established by the Federal legislation, that the latter does not permit concurrent State regulation in this area, that since Congress has occupied this field it is closed to State regulation, and ergo, that our State statute is unconstitutional.

"Our analysis of the *O'Brien* case, *supra*, does not lead us to the same conclusion. In that case the constitutionality of the strike vote provision of the Michigan labor mediation law was questioned. The Union had struck against a private industrial organization, engaged in interstate commerce, without conforming to the prescribed state procedure; the state procedure differed from that provided in the Federal legislation and the court decided that because of the conflict the state statute was unconstitutional. The court said that the regulation of the right to peacefully strike for higher wages had been preempted by Congress, but the case being decided by the court involved a statute regulating the right to strike against private industry.

"It was not a statute such as the New Jersey statute, in which a state, in the exercise of its sovereignty, seeks to maintain without interruption the supply of services, considered essential to the welfare and health of its people, being furnished by a public utility, operating under a franchise by the state, whose services furnished are primarily intrastate. It is significant that in the *O'Brien* case, *supra*, the court said, 'Even if some legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the Federal Act.' Our examination of the Federal Act discloses no provision therein which prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would

imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested', *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. Ed. 1154 (1942), we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been preempted by Congress, and that the *O'Brien* case, *supra*, is inapplicable to the present situation.

"We reiterate the statement made in the *Van Riper* case, *supra*, that 'Thus the power still resides in the states in a proper case to prohibit strikes notwithstanding the existing Federal legislation.' We consider this a 'proper case' within the foregoing statement and find nothing in the *O'Brien* case, *supra*, of a dissuasive nature."

The Wisconsin Supreme Court in the recent case of *Wisconsin Employment Relations Board v. Milwaukee Gas Light Co.*, — Wis. —, 44 N. W. (2d) 547

(Nov. 8, 1950), extensively quotes from the above New Jersey case and concludes that the O'Brien decision of this court has no application to public utilities.

This conclusion coincides with the view expressed soon after enactment of the Taft-Hartley Act that "state compulsory arbitration provisions are suspended" in the public utility field only in those "major utility disputes" of "nation wide importance". The Taft-Hartley Act and State Jurisdiction Over Labor Relations—Russel A. Smith, 46 Michigan Law Review (March, 1948) 593, 623. See also, Constitutionality of Compulsory Arbitration Statutes in the Public Utility Field, 44 Illinois Law Rev. 546.

The extent to which American citizens and their homes, both urban and rural are dependent upon public utility services of transportation, electricity, communications and gas cannot be over-emphasized. In a very real sense continuity of these services is indispensable to public health and safety. Yet under federal law, no recourse whatever exists for a break-down of these essentials until "national health or safety" is imperiled.

The consequences within states and local areas of discontinuances of these essentials is no less tragic and dangerous because all others in this nation are not equal sufferers. The legal vacuum in federal authority now existing is not filled by prospects that if the break-down becomes universal, action by the federal government may be anticipated.

Surely if there is any area where the sovereign power of states should not be rendered helpless and

impotent "by implication", this is it. If, under the commerce power, Congress desires or intends to preempt the entire field, is it not fair and reasonable to require that such intention be expressed directly and unequivocally in accordance with historical and accepted standards?

Our contentions in this regard are fully supported by both Committee Reports concerning a proposed National Labor Relations Act of 1949, now pending in the Congress (81st Congress, 1st Session, S. 249, Report No. 99, Part 2, Minority Views). At page 61 the Committee on Labor and Public Welfare recommends that the provision as to a closed shop be rewritten so as to permit overriding of state authority. Citing *Algoma Plywood Co. v. Wisconsin Labor Relations Board*, supra, the committee states:

"* * * The Court, in its later decision, made reference to, but did not find it necessary to rely on, the principle that, 'in cases of concurrent power over commerce *State law remains effective so long as Congress has not manifested an unambiguous purpose that it should be supplanted.*' It is our desire that section 107 will constitute a manifestation of an 'unambiguous purpose' on the part of the Congress, to supplant those State laws which seek to regulate or prohibit union-security agreements and check-off provisions in a manner inconsistent with the policy set forth in this provision." (emphasis supplied).

The Minority Report also acknowledges that the provision in the present act was not necessary in order to permit state action in this field. Senator Taft states (p.38):

"While recent decisions of the Supreme Court (*Algoma Plywood v. Wisconsin Board* [decided March 7, 1949]), indicate that section 14 (b) of the Taft-Hartley Act was unnecessary to give validity to State laws abolishing or regulating compulsory union membership within their borders, we now believe it necessary that the provision be retained. The Court laid considerable stress upon the congressional history of the Wagner Act and found that it had not been the intent to invalidate State laws even though interstate commerce was involved. Elimination of the provision now might be construed as reflecting a contrary intent." (emphasis supplied).

The Fundamental Public Utility Obligation of Continuous Service Historically Subjects Both Utilities and Their Employees to State Control of All Threatened Interruptions of Service.

No adequate review of this case may omit full consideration of the unique historical position of public utilities in our legal system. The opinion of the Wisconsin court below concisely and carefully portrays this status and history (42 N. W. [2d] 474).

The historic concept of businesses "affected with a public interest", as this court has declared, reflected common law principles and was founded upon the public nature and character of certain essential enterprises. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. A good review of the development of the law in this field is contained in *Labor and the Law in the Public Utility Field*, George Jarvis Thompson, 21 Mich. Law Review 1. From this article and such legislation as the British Conspiracy and Protection of Property Act

of 1875, 38 and 39 Victoria, c. 86, it will be seen that recent legislation to prevent strikes in the public utility business were not entirely unknown in the nineteenth century.

The primary and unqualified obligation of such a business is to continuously serve the public. This responsibility is referred to in *Wilson v. New*, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755:

“* * * Clear also is it that an obligation rests upon a carrier to carry on its business, and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so, and also that government possesses the full regulatory power to compel performance of such duty.” (243 U. S. 349-350).

In the same opinion this court describes the “power to enforce the duty of operation” by regulating employer-employee relations so as not to “leave the public helpless, the whole people ruined, and all the homes of the land submitted to a danger of the most serious character” (243 U. S. 351).

The inability of public utilities to discontinue service is also emphasized in *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103:

“A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public.” (262 U. S. 543).

The foregoing opinion stresses that this power to “compel continuity in a business” is the distinctive

mark of public utility enterprises and justifies the control of employment relationships in that field. See also

1 Teller, Labor Disputes and Collective Bargaining, Sec. 53.

The most important observation concerning *Wilson v. New*, supra, and *Wolff Packing Co. v. Court of Industrial Relations*, supra, as well as other authorities, is that it is generally recognized that the employee in a public utility business assumes the same obligation as the utility for continuous service. In *Wilson v. New*, 243 U. S. 352-353, the opinion of Chief Justice White declares:

"(b) As to the employee.—Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he desires, to them, and, by concert of action, to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied, and the resulting right to fix, in case of disagreement and dispute, a standard of wages, as we have seen, necessarily obtained."

In the concurring opinion of Mr. Justice McKenna this responsibility is adverted to as follows:

"* * * When one enters into interstate commerce, one enters into a service in which the public has an interest, and subjects one's self to its behests. * * *" (243 U. S. 364).

That the public utility employee as well as the employer "owes a direct duty to the public served" is well settled. Labor and the Law in the Public Utility Field, George Jarvis Thompson, 21 Mich. Law Review 1, 13, 14. By entering into such employment the employee voluntarily assumes a public duty that is inconsistent with rights existing in private employment.

Toledo A. A. & N. M. Ry. Co. v. Penn. Co.,
(c. c. Ohio) 54 Fed. 746, aff'd. sub. nom.
Ex Parte Lennon, 64 Fed. 320 and sub. nom.
Ex Parte Lennon, 166 U. S. 548, 17 S. Ct.
658.

Burgess Bros. Co. v. Stewart, 112 Misc. 347,
184 N. Y. S. 199, 207 aff'd., 194 App. Div.
913, 185 N. Y. S. 85.

Stephens v. Ohio St. Tel. Co., (D. C. Ohio)
240 Fed. 759, 775.

The duty and obligation of both utilities and their employees to provide continuous uninterrupted service has historically justified complete regulation of employer-employee relations in the State of Nebraska even before provision was made in 1920 for establishment of an Industrial Relations Court. — In *Short v. Omaha & C. B. St. Ry. Co.*, P. U. R. 1920 F. 269, the Nebraska Railway Commission held that it had authority to prescribe wage rates of utilities in order to provide a "continuance of adequate service" (p.273). The Commission cited a number of decisions of the Supreme Court of Nebraska going back to the earliest reports as to the duty and responsibility of providing uninterrupted service. It was concluded that under these authorities the Commission

had jurisdiction to fix a "scale of wages that would attract an adequate number of capable employees to enable the defendant to carry on its service" (p. 273). Significantly, in that case the jurisdiction of the Commission was invoked by the employees.

The foregoing case was considered (like the case at bar should be viewed) as involving:

"* * * the question of whether or not the people have the power to protect themselves in the continuance of an important public service when that service is threatened with interruption or destruction. It seems to us to propound the question is to answer it. It is self-evident that the public has a right to protect itself; that the people do not have to sit idly by and see the industries and social life of a whole community brought to a state of paralysis because the owners and the employees of a transportation system are not in agreement as to wages." (P. U. R. 1920 F. 277-278).

Public Power Strikes in Nebraska.

In one area of utility regulation Nebraska has a situation that is different from most states. As indicated earlier, private power companies have been eliminated in Nebraska and public power companies occupy the entire field. These public districts, organized as public corporations of the state, constitute in each case a "governmental subdivision of the State."

Platte Valley Public Power & Irrigation District v. County of Lincoln, 144 Neb. 584, 14 N. W. (2d) 202.

Strikes involving these districts are prohibited under the legislation reviewed before. By reason of

their legal status, strikes against such districts become in effect strikes against a subdivision of the state government.

Federal legislation (29 U. S. C. A., Sec. 188) forbids strikes against "any agency" of the United States "including wholly owned government corporations". Surely no one would contend that this prohibition in federal legislation operates to authorize strikes against state governments and agencies thereof. A decision however that federal legislation completely occupies and preempts the field would lead to the conclusion that states are powerless to prevent strikes against themselves. No such result was intended in any existing federal legislation and we submit that no such legislation could be constitutionally enacted by the Congress.

If we are to approach the problem presented in the present case realistically and in the broadest sense, we will find that under modern trends the local public utility is fast becoming a monopoly amounting to a de facto department or agency of state government. This development is very well described by Professor Clarence M. Updegraff in an article now being published in 36 Iowa Law Review 61, "Compulsory Settlement of Public Utility Disputes."

"It will be recognized that since all public utility properties are owned and operated for purposes which entitle the utility companies to take lands of private owners for their use without violating the 'due process' clause, the utility is in the most complete sense discharging a 'public service.' It is analogous to a branch or department of the state government. Virtually all of the bus-

institutions now referred to as public utilities are in one part of the world or another, commonly owned and operated by sovereign states, so that in a very real and correct sense it may be said that the public utilities are to be identified with government agencies for which they are in a sense, substituted. Since they have become monopolies because of their duty, like that of the government, to serve all at reasonable rates, they have reached a point of development where it becomes necessary to sustain their unfailing operation just as government itself is sustained. This is to secure protection of the health, public safety, and general welfare of the population or general public. Indeed, the public health, morals, safety, and general welfare (so zealously guarded by the sovereign police power) would be much more quickly impaired by discontinuance of certain public utility services than by temporary suspension of many governmental agencies.

"Thus, it appears that there is reason to recognize that a work stoppage affecting a public utility is as important as, and in fact very much like in its consequences, a stoppage of work affecting an essential governmental agency."

36 Iowa Law Review 64.

Referring to statutes such as those involved in this case, Professor Updegraff states:

"* * * The legislatures which have passed the statutes here under consideration and the New Jersey court, which has passed upon the same, have recognized that the individual employees who elect to work for public utilities may properly be held to have less freedom in respect to collective action than employees in the private industries.

"This also has numerous precedents, which appear to support the conclusion that workers in

the public utilities field do not have all the rights and privileges in respect to collective bargaining and application of collective pressures upon their employers which are available to employees in nonpublic activities. Other obvious situations where this is true are seen in the Army, Navy, police forces, fire fighting forces, and various other public and quasi-public activities. All the arguments used to sustain the conclusion that strikes against the government may be prohibited operate in the same measure to sustain the contention that strikes against public utilities may be regulated and restricted. * * *

36 Iowa Law Review 69.

The Wisconsin Supreme Court in the recent case of *Wisconsin Employment Relations Board v. Milwaukee Gas Light Co.*, — Wis. —, 44 N. W. (2d) 547, (Nov. 8, 1950), adopts the reasoning above outlined and states:

"* * * Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that the utilities are state agencies. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers. Under a proper interpretation of the federal act, the state is still sovereign in the field covered by the public utility anti-strike law. The federal act makes provision for national emergencies, but it does not and cannot legislate in the field of local emergencies." (44 N. W. [2d] 551).

CONCLUSION.

We submit that Congress has not expressed an unambiguous purpose and intention to exclude states

from exercising their police power to protect the public health, peace and safety by insuring continuity of essential services in the public utility field; and that as agencies and instrumentalities of states, public utilities and their employees are subject to complete control and regulation by state governments.

Respectfully submitted,

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APPENDIX.

Pertinent Sections of Legislative Bill No. 349, Laws of Nebraska, Chapter 178, page 585, Revised Statutes of Nebraska, 1949 Cumulative Supplement, Sections 48-801 to 48-823.

Sec. 4. The Court of Industrial Relations shall be composed of three judges who shall be appointed by the Governor, with the advice and consent of the Legislature. Of the three judges first appointed, one shall be appointed for a term of two years, one for a term of four years, and one for a term of six years, the terms to begin simultaneously upon qualification of the persons to be appointed within thirty days after the effective date of this act. Upon the expiration of the term of the three judges first appointed, each succeeding judge shall be appointed and hold office for a term of six years and until his successor shall have qualified. In case of a vacancy in the office of judge of the Court of Industrial Relations, the Governor shall appoint his successor to fill the vacancy for the unexpired term.

Sec. 5. The judges of the Court of Industrial Relations shall not be appointed because they are representatives of either capital or labor, but they shall be appointed because of their experience and knowledge in legal, financial, labor and industrial matters.

Sec. 11. Any employer, employee, or labor organization, or the Attorney General of Nebraska on his own initiative or by order of the Governor, when any industrial dispute exists between parties as set forth in section 10 of this act, may file a petition with the Court of Industrial Relations invoking its jurisdiction.

Sec. 13. Whenever the jurisdiction of the Court of Industrial Relations is invoked, notice of the pendency of the proceedings shall be given either by summons issued and served as summonses are issued and served in the district courts, or, in the discretion of the court, by publication in a legal newspaper of general circulation in the State of Nebraska two consecutive weeks. Such notice shall fix the time and place for hearing and in general terms set forth the matters to be heard and determined. Such notice may be waived by voluntary appearance. The court may in its discretion use such additional means of publication as the court may deem advisable.

Sec. 14. The Court of Industrial Relations may employ such expert accountants, engineers, stenographers, attorneys and other employees as the court finds necessary. Officers and employees of the court whose salaries are not fixed by law shall be paid such compensation as may be fixed by the court with the approval of the Governor.

Sec. 16. After a petition has been filed under the provisions of section 11 of this act, the clerk shall immediately notify the members of the Court of Industrial Relations, which court shall promptly convene at its office to take such preliminary proceedings

as may be necessary to insure a prompt hearing and speedy adjudication of the industrial dispute. The court shall have power and authority upon its own initiative to make such temporary findings and orders as may be necessary to preserve and protect the status of the parties, property and public interest involved, pending final determination of the issues. In the event of an industrial dispute between employer and employees of a public utility not operated by government in its proprietary capacity, where such employer and employees have failed or refused to bargain in good faith concerning the matters in dispute, the court may order such bargaining to be begun or resumed, as the case may be, and may make any such order or orders as may be appropriate to govern the situation pending such bargaining.

Sec. 18. The findings and order or orders may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such findings and order or orders, the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions, in the same labor market area and, if none, in adjoining labor market areas within the state and which in addition bear a generally comparable relationship to wage rates paid and conditions of employment maintained by all other employers in the same labor market area. The court shall determine in each case, what constitutes "the same labor market area" or

"adjoining labor market areas" in the state. If an employer has more than one plant or office and some or all of such plants or offices are found to be located in separate labor market areas, the court may establish separate wage rates or schedules of wage rates, and separate conditions of employment, for all plants and offices in each such labor market area. In establishing wage rates the court shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees. Any order or orders entered may be modified on the court's own motion or on application by any of the parties affected, but only upon a showing of a change in the conditions from those prevailing at the time the original order was entered.

Sec. 21. It shall be unlawful for any person:

(1) To hinder, delay, limit or suspend the continuity or efficiency of any governmental service or any governmental service in a proprietary capacity, or the service of any public utility, by lockout, strike, slowdown, or other work stoppage;

(2) To coerce, instigate, induce, conspire with, intimidate or encourage any person to participate in any lockout, strike, slowdown or other work stoppage, which would hinder, delay, limit or suspend the continuity or efficiency of any governmental service or

governmental service in a proprietary capacity, or the service of any public utility; or

(3) To aid or assist any such lockout, strike, slowdown, or other work stoppage by giving direction or guidance in the conduct of any such lockout, strike, slowdown or other work stoppage or by providing funds for the conduct or direction thereof, or for the payment of strike, unemployment or other benefits to those participating therein.

Any person who willfully violates any of the provisions of this section, upon conviction thereof, shall be subject to a fine of not less than ten dollars nor more than five thousand dollars, or to imprisonment not less than five days nor more than one year, or to both fine and imprisonment.

Sec. 22. No provision of this act shall be construed to require an employee to work without his consent, or to make illegal the quitting of his job or withdrawal from his place of employment unless done in concert or by agreement with others.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC
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AMERICA, DIVISION 998, ET AL., PETITIONERS**

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MILWAUKEE ELECTRIC RAILWAY & TRANSPORT
COMPANY, A WISCONSIN CORPORATION**

**ON WRITS OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF WISCONSIN**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS
AMICUS CURIAE**

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 329

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC
RAILWAY AND MOTOR COACH EMPLOYEES OF
AMERICA, DIVISION 998, ET AL., PETITIONERS

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

No. 330

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC
RAILWAY AND MOTOR COACH EMPLOYEES OF
AMERICA, DIVISION 998, ET AL., PETITIONERS

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
ET AL., CARL LUDWIG, H. HERMAN RAUCH, AND
MARTIN KLOTSCH, INDIVIDUALLY AND AS MEM-
BERS OF A BOARD OF ARBITRATION, AND THE
MILWAUKEE ELECTRIC RAILWAY & TRANSPORT
COMPANY, A WISCONSIN CORPORATION

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF WISCONSIN

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS
AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin in No. 329 (R. 163-171) is reported at 257 Wis. 43, 42 N. W. 2d 471, and its opinion in No. 330 (R. 235-237) is reported at 257 Wis. 53, 42 N. W. 2d 477. The opinions of the Circuit Court for Milwaukee County in No. 329 (R. 330, 101-118) and in No. 330 (R. 336, 101-106), are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C. The petitions for writs of certiorari were granted on November 6, 1950.

QUESTION PRESENTED

The Board's interest in these cases¹ is limited to the single question, namely, whether the provisions of the National Labor Relations Act preclude Wisconsin from absolutely banning strikes in support of lawful economic demands by employees in certain industries subject to the National Act, and requiring employees and labor organizations in such industries to submit dis-

¹ This question is also presented in *United Gas, Coke and Chemical Workers, et al. v. Wisconsin Employment Relations Board*, No. 438, certiorari granted, December 11, 1950, and may be reached in *St. John, et al. v. Wisconsin Employment Relations Board*, No. 302, probable jurisdiction noted, October 23, 1950. The Board's position as stated herein applies equally to these cases.

putes over wages, hours and working conditions to compulsory arbitration.

STATUTES INVOLVED

The pertinent provisions of the Wisconsin statute, Secs. 111.50-111.65, Subchapter III of Chapter 111 of the Wisconsin Statutes (1949), are set forth in the appendix to the Petition for Certiorari in No. 330. Copies of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*) will be made available to the Court.

STATEMENT

The Milwaukee Electric Railway and Transport Company, a privately owned corporation, hereinafter referred to as the Company, is engaged in the business of furnishing streetcar, trolley and motorbus transportation in the city of Milwaukee, Wisconsin (No. 330; R. 163-164; No. 329; R. 101-102, 140). The operations of the Company affect interstate commerce within the meaning of the National Labor Relations Act (No. 329; R. 106-107, 140-141, 163-164).² The Company

² The Company furnishes transportation service for thousands of employees of commercial and industrial establishments, many of which are engaged in the production of goods for interstate commerce; it purchases its rolling stock, valued at over \$2,000,000, from sources outside the State of Wisconsin (No. 329; R. 106-107, 140-141, 153-154). Upon these facts, the National Labor Relations Board, in 1947, assumed jurisdiction over the Company and conducted a

employs approximately 3,100 employees, of whom approximately 2,700 comprise the appropriate collective bargaining unit for which Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the Union, is the exclusive representative under Section 9 (a) of the National Labor Relations Act (No. 329; R. 164; No. 308; R. 164).

From 1934 through December 1948, the Company and the Union maintained contractual relationships through collective bargaining without resort to strike or lockout (No. 329, R. 105, 108; No. 330, R. 164). On June 11, 1948, the parties executed a collective bargaining agreement terminable by either party on December 31, 1948, by the giving of appropriate notice sixty days in advance of that date (No. 330, R. 164-165).

On October 27, 1948, in accordance with the terms of the contract and Section 8 (d) of the Labor Management Relations Act, the Union sub-

union-shop authorization election pursuant to the provisions of Section 9 (e) (1) of the National Labor Relations Act (No. 330; R. 132). *Milwaukee Electric Railway & Transport Co.*, Case No. 31-UA-8. The National Board's Regional Office, in addition, is presently investigating on the merits a charge filed with it by the Union that the Company in the course of negotiations which led to the application of the Wisconsin statute here in issue, refused to bargain collectively in good faith in violation of Section 8 (a) (5) of the National Act (No. 329; R. 106, 144; No. 330, R. 224-225). *Milwaukee Electric Railway & Transport Co.*, Case No. 13-CA-212.

mitted to the Company written proposals for certain specified changes in the contract and requested a bargaining conference (No. 330, R. 165). On October 29, 1948, the Company notified the Union that it was terminating the agreement as of December 31, 1948, and submitted its own proposals for a new contract (No. 330, R. 165-166). Negotiations were conducted during November and December 1948, but did not result in an agreement (No. 330, R. 166). The principal issues in dispute were wages, hours and working conditions (No. 330, R. 175-205). The Union offered to submit the issue to voluntary arbitration; the Company rejected this proposal (No. 329; R. 141-144, 108; No. 330, R. 166),³ and insisted that the only way the matter could be determined was through statutory arbitration (No. 329, R. 144, 108).

³ In an affidavit filed with the state board, George Koechel, president of the Union, asserted that the Company advanced as its reason for refusing to agree to voluntary arbitration, the fact that it was committed by agreement with all other public-utility employers in the State of Wisconsin to refuse such method of arbitration (No. 330, R. 134, cf. 149). In its answer to the complaint, the Union alleged that the Company's final offer during the process of conciliation was less favorable than any offer it had previously made (No. 329, R. 143). This allegation was undenied and was treated as true by the Circuit Court (No. 329, R. 108). In its charge filed with the Board's Regional Office on February 9, 1949, Case No. 13-CA-212, see note 2, *supra*, the Union alleged that the parties' failure to reach agreement in these negotiations was the result of the Company's refusal to bargain collectively in good faith (No. 330, R. 152-153, 224-225).

No. 329.—As a result of the parties' failure to agree upon the terms of a new contract, and in support of its economic demands, the Union, on December 31, 1948, voted to authorize its General Executive Board to call a strike (R. 102, 132-133). The Executive Board set January 5, 1949, as the date of such strike, and gave publicity to this action (R. 102). Thereupon, the Wisconsin Board, pursuant to Section 111.63 of the State Act, filed a petition in the Circuit Court of Milwaukee County (R. 120-124) to enjoin the proposed strike. The court, on January 4, 1949, issued a temporary restraining order⁴ (R. 119-120), and on April 11, 1949, issued a permanent injunction (R. 151-156, 157), restraining petitioners from (R. 155-156):

calling a strike, going out on strike or causing any work stoppage or slow-down which would cause an interruption of the passenger service of the Milwaukee Electric and Transport Company in the State of Wisconsin, and from instigating, inducing or conspiring with or encouraging any strike or slow-down or work stoppage which would cause interruption of the public passenger service of said Company, all subject to 111.64 Wisconsin statutes.

In so holding the court rejected petitioners' contention that the injunction and the statutory pro-

⁴ In obedience to this order, the strike was postponed pending disposition of the injunction action (R. 103).

visions on which it was based conflicted with the National Labor Relations Act, and therefore violated the Commerce Clause of the Constitution of the United States (R. 145-146, 154).

On May 2, 1950, the Supreme Court of Wisconsin affirmed the judgment on the authority of *International Union v. Wisconsin Employment Relations Board*, 333 U. S. 853 (R. 163-171), and on June 30, 1950, denied petitioners' motion for rehearing (R. 172-173).

No. 330.—On December 31, 1948, the Company, alleging that the parties had reached an impasse in negotiations, filed a petition with the State Board pursuant to Section 111.54 of the Act, requesting the appointment of a conciliator (R. 119).⁵ Upon finding that an impasse had occurred despite good faith efforts of the parties to reach agreement,⁶ the State Board, on January 5, 1949, appointed a conciliator (R. 137-139). On January 29, the conciliator advised the Wisconsin Employment Relations Board that had been

⁵ In an affidavit submitted by the Union to the State Board in support of its motion to dismiss the Company's petition for appointment of a conciliator, it was alleged that a representative of the Federal Conciliation and Mediation Service was still actively engaged in attempting to mediate the dispute when the Company invoked the provisions of the State law (R. 134). In reviewing the arbitration award the Circuit Court found "the employees were willing to continue to bargain. The Company, apparently, was not" (R. 104).

⁶ The good faith of the employer in these negotiations is one of the issues presently being investigated by the National Board. See notes 2 and 3, *supra*.

unable to effect a settlement within the time allotted (R. 141). On January 31, the Board, acting pursuant to Section 111.55 of the Wisconsin statute, appointed a Board of Arbitration (R. 143).

After conducting a hearing the Board of Arbitration issued its findings of fact, decision and order (R. 162-213, 214-222) which was filed, as required by the statute, with the clerk of the Circuit Court of Milwaukee County, on April 11, 1950 (R. 101, 108, 113, 116). The Union thereupon filed a petition in that court to review and set aside the Board's order on the principal ground that the entire proceedings and the statute under which they were conducted were null and void because they violated the Commerce Clause of the Federal Constitution in that they were in conflict with the National Labor Relations Act (No. 330, R. 106, 103, 145).

A judgment denying relief was issued on February 23, 1950 (R. 225-226). On appeal, the Supreme Court of Wisconsin affirmed the judgment on the authority of its decision in No. 329, p. 7, *supra* (R. 237).

SUMMARY OF ARGUMENT

A. The plan of regulation which Wisconsin has attempted to apply to the bargaining relationship here involved is inconsistent with the applicable federal plan of regulation. The National Act

permits strikes for higher wages after the notices contemplated by Section 8 (d) have been filed and the appropriate waiting period has been observed. Under the state Act, such a strike would be unlawful, and, in the instant case, was perpetually enjoined. In bargaining over the terms of a new contract, under the provisions of the National Act, the parties are obliged to negotiate in good faith with a view toward reaching an agreement, but neither party can be required to "agree to a proposal" or make a concession (Section 8 (d)). Under the state Act, if an impasse or stalemate is reached, the parties may be compelled to accept terms imposed by a state appointed board of arbitration. Under the scheme of the National Act, the parties understand that if an impasse or stalemate is reached, despite efforts of governmental agencies to resolve the dispute through mediation and conciliation, a strike may lawfully occur. Under the state Act negotiations are conducted with the understanding that there cannot be an ultimate resort to strike. Thus, under the state law, the ultimate sanction relied upon by Congress to induce the parties to reach agreement is eliminated. Experience has shown that where compulsory arbitration is by law made the terminal point in the bargaining process, voluntary agreements are seldom reached. The prospect of settlement through compulsory arbitration creates an atmosphere hostile to fruitful negotiations.

B. The terms of the National Act and its legislative history show that Congress rejected compulsory arbitration as incompatible with the system of free collective bargaining.

1. The Act on its face shows that Congress rejected governmental imposition of terms and conditions of employment in favor of a system of free collective bargaining in which terms and conditions of employment are fixed by voluntary agreement of the parties. Governmental agencies, though encouraged to assist in the settlement of disputes by providing facilities for conciliation, mediation and voluntary arbitration, were precluded from determining the merits of the position of the parties, or compelling the parties to agree to or abide by any particular terms or conditions of employment.

2.^a Here, as in *United Automobile Workers v. O'Brien*, 339 U. S. 454, the legislative history of the National Act shows that Congress considered and rejected on the merits the specific scheme of regulation which the state has attempted to impose. Congress rejected proposals to prohibit strikes and impose compulsory arbitration in public utility disputes because it believed such measures to be incompatible with free collective bargaining and because they tended to lead to "complete socialization of our economy." Statement of Senator Taft, Legislative History of the Labor Management Relations Act, pp. 1007-1008. For

these reasons Congress rejected provisions for compulsory arbitration even as to strikes which created national emergencies (*ibid.*). See also, S. Rep. No. 105 on S. 1126, pp. 2, 13-14. The legislative history also shows that despite proposals to treat labor disputes in public utilities differently from labor disputes in other industries subject to the Act because such disputes affected the public more seriously, Congress chose to preserve collective bargaining and the right to strike in these industries as in all others. Congress refused to incorporate in the law "an ultimate resort to compulsory arbitration or to seizure, or to any other action" in public utility disputes.

C. The holding of this Court in *United Automobile Workers v. O'Brien*, 339 U. S. 454, 456-457, that none of the pertinent sections of the National Act "can be read as permitting concurrent state regulation of peaceful strikes for higher wages," is applicable to privately owned public utilities, as the citation of *La Crosse Telephone Corp. v. Wisconsin Board*, 336 U. S. 18, in support of that holding indicates. Application of the state Act thwarts this intention. By destroying the right to strike for higher wages completely, the Wisconsin Act makes far deeper inroads upon "federally protected labor rights" than did the Michigan statute which was struck down in the *O'Brien* case. 339 U. S., at p. 458. By imposing compulsory arbitration, the state Act impairs

collective bargaining and conflicts with the determination of Congress that such measures should not be imposed in local public utilities subject to the National Act. Nothing in the language or legislative history of the Act suggests that Congress intended to permit the states to override its deliberate judgment in this respect. If Congress had so intended it would clearly have provided for reservation of such power to the States. Compare Sections 10 (a), 14 (b), 8 (d), 202 (c) and 203 (b).

That Congress, even in treating national emergency strikes, rejected compulsory arbitration and left employees free to strike, after the eighty-day waiting period was complied with, establishes beyond question that such measures, for whatever reason applied, are incompatible with national policy. Congress certainly did not intend to sanction for the treatment of local emergencies, measures which it refused to permit even to avoid great hardships to the entire Nation.

The Wisconsin statute also narrows the subject matter of the collective bargaining required by federal law, inasmuch as it prohibits arbitrators from making awards which "infringe management prerogatives", as defined in Wisconsin.

We do not contend that the federal statute completely bars the states from dealing with local emergencies resulting from utility strikes. Congress plainly contemplated that state mediatory

agencies could still function. Whether the states can go further need not be determined here. They certainly cannot use means inconsistent with federal policy, which Congress has specifically rejected for national emergencies, although they might perhaps adopt for local emergencies measures not impairing collective bargaining to a greater extent than those employed by Congress for national emergencies.

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, PRECLUDES WISCONSIN FROM APPLYING ITS COMPULSORY ARBITRATION, NO-STRIKE STATUTE TO THE COLLECTIVE BARGAINING RELATIONSHIP HERE INVOLVED

A. THE PRACTICAL DIFFERENCES BETWEEN THE NATIONAL ACT AND THE WISCONSIN STATUTORY SCHEME

1. THE NATIONAL ACT

(a) *Provisions regulating collective bargaining and preserving the right to strike.*—In the National Labor Relations Act, as amended, as in the initial Act, Congress, to protect the public interest in the free flow of commerce, adopted the policy of “encouraging the practice and procedure of collective bargaining” (Section 1). In Section 201 (a) of the Labor Management Relations Act, Congress declared that it is through this process that “sound and stable industrial peace and advancement of the general welfare, health, and safety of the Nation and of the best interests of

employers and employees can most satisfactorily be secured." Section 8 (d) of the National Act, as amended, defines in detail the "duty to bargain collectively," which Congress, in furtherance of this policy, imposed upon both employers and labor organizations. Employers and labor organizations subject to the Act are required to negotiate in good faith with respect to wages, hours and other terms and conditions of employment with a view toward reaching an agreement, and are required to reduce to writing any agreement reached, if that is requested by either party. The Section specifically states, however, that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

Aware that existence of the right to strike in support of lawful economic demands is indispensable to the practice of collective bargaining, Congress in Sections 7, 2 (3), and 13 of the amended Act, as in the initial Act, "safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *United Automobile Workers v. O'Brien*, 339 U. S. 454, 457.

(b) *Provisions defining the role of governmental agencies in avoiding strikes.*—Congress in Section 201 (b) of the Labor Management Relations Act declared that

the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration * * *

To this end Congress, in the amended Act, created the Federal Mediation and Conciliation Service (Sections 202-204), authorized to "seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion." Section 203 (c). Congress contemplated also that state agencies would play an important role in furnishing such services, particularly in disputes having only a minor effect on interstate commerce. Thus, Section 203 (b) provides that "The Director and Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties."

To afford adequate opportunity for mediation and conciliation efforts, Congress, in Section 8 (d), provided that thirty days' notice to the Federal Mediation and Conciliation Service and to any "State * * * agency established to mediate and conciliate disputes within the State * * * where the dispute occurred" should be

* Formerly the Conciliation Service of the Department of Labor.

a prerequisite to strikes over contract termination or modification. Emphasizing that the conciliation and mediation procedure contemplated in these provisions did not comprehend authority to impose terms of settlement against the will of the parties, Congress further provided in Section 203 (c) that "The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act."

In Sections 206-210, Congress "detailed procedures for strikes which might create a national emergency." *United Automobile Workers v. O'Brien*, 339 U. S. 454, 457. Section 206 provides that: "Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him." The report shall include a statement of facts with respect to the dispute "but shall not contain any recommendations." Section 208 (a) provides that upon receiving a report from such a board of inquiry the Presi-

dent may direct the Attorney General to obtain injunctive relief against the threatened strike or lockout, and authorizes the district courts of the United States to issue such injunctions, effective for a period of eighty days (Sections 209-210). Section 209 (a) further provides that during the period in which such an injunction is outstanding the parties to the dispute shall "make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service." If at the end of sixty days a settlement has not been reached, the board of inquiry makes a further report which is to be published by the President, and the National Labor Relations Board conducts a secret ballot on the employer's last offer of settlement and certifies the results thereof to the Attorney General (Section 209 (b)). Section 210 provides that eighty days after issuance of the injunction, the injunction shall be discharged on motion of the Attorney General, and a comprehensive report on the dispute shall thereupon be submitted by the President to Congress.

(c) *Application of the provisions of the National Act to privately owned public utilities affecting commerce.*—The National Act, as amended, exempts from its definition of "employer," and hence from the applicability of the

Act, "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act" (Section (2)), and employees of persons so exempted (Section 2 (3)). "These exceptions aside, the Act applies to all private employers engaged in operations affecting interstate commerce and to their employees (Section 2 (6) and (7)). The Act has often been held to apply to private public utilities, which are engaged in the furnishing of such services as water, light, heat, gas, electric power, public passenger transportation and communication, the operations of which affect interstate commerce. *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18; *Consolidated Edison v. National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board v. Baltimore Transit Company*, 140 F. 2d 51 (C. A. 4), certiorari denied, 321 U. S. 795; *National Labor Relations Board v. Gulf Public Service Co.*, 116 F. 2d 852 (C. A. 5); *Pueblo Gas and Fuel Co. v. National Labor Relations Board*, 118 F. 2d 304 (C. A. 10); *National*

*The exemption of wholly owned Government corporations, Federal Reserve Banks, and hospitals operated not for profit did not appear in the original Act (Section 2 (2) and (3)).

Labor Relations Board v. Central Missouri Telephone Co., 115 F. 2d 563 (C. A. 8). Section 10 (a) of the amended Act expressly confirms the Board's jurisdiction over companies engaged in furnishing "transportation", where the operations are "predominantly local in character".

The Act does not distinguish in any respect between enterprises of this character and enterprises engaged in the production of goods affecting interstate commerce. The National Board conducts representation proceedings, and fixes appropriate bargaining units composed of employees of privately owned public utilities (*La-Crosse* case, and cases cited, note 8, *infra*). The appropriate unit in these industries, as in industries engaged in the production of goods (cf. *United Automobile Workers v. O'Brien*, 339 U. S. 454, 458), sometimes includes employees in more than one state.⁹ In these industries, as in all others subject to the Act, the Board enforces the duty to bargain collectively, and protects against em-

⁹ *American Bus Lines, Inc.*, 79 NLRB 329; *Pacific Telephone and Telegraph Co.*, 58 NLRB 1042; *Gulf States Utilities Co.*, 31 NLRB 740; *Southwestern Associated Telegraph Co.*, 76 NLRB 1105; *New England Telephone & Telegraph Co.*, 90 NLRB No. 102; *Dixie Motor Coach Corp.*, 25 NLRB 869, enforced, 128 F. 2d 201 (C. A. 5); *Capitol Greyhound Lines*, 49 NLRB 156, enforced, 140 F. 2d 754 (C. A. 6); *Delaware-New Jersey Ferry Co.*, 1 NLRB 85, set aside on other grounds, 90 F. 2d 520 (C. A. 3). Cf. *Norfolk Southern Bus Co.*, 66 NLRB 1165, enforced 159 F. 2d 516 (C. A. 4), certiorari denied, 330 U. S. 844.

employer interference the right to engage in "concerted activities" which the Act recognizes.¹⁰

Construing the initial Act, the Board and the courts explicitly rejected the contention that because the States regulate the rates and service of public utilities, and because of the importance to the public of the service which employees of public utilities perform, such employees should not be deemed to be protected by the Act when they exercise the right to strike for legitimate economic demands. In *El Paso Electric Co.*, 13 N. L. R. B. 213, 240, enforced, *sub nom.*, *El Paso Electric Co. v. National Labor Relations Board*, 119 F. 2d 581 (C. A. 5), a strike case, the Board explicitly, stated that the Act does not "distinguish between public-utility employees and those otherwise employed." ¹¹ The pertinent provisions of the initial Act, Sections 2 (3), 7 and 13, on

¹⁰ *National Labor Relations Board v. Central Missouri Telephone Co.*, 115 F. 2d 563 (C. A. 8); *Pueblo Gas & Fuel Co. v. National Labor Relations Board*, 118 F. 2d 304 (C. A. 10); *National Labor Relations Board v. Western Massachusetts Electric Co.*, 120 F. 2d 455 (C. A. 1); *National Labor Relations Board v. Gulf Public Service Co.*, 116 F. 2d 852 (C. A. 5); *El Paso Electric Co. v. National Labor Relations Board*, 119 F. 2d 581 (C. A. 5); *Kansas City Power & Light Co. v. National Labor Relations Board*, 111 F. 2d 340 (C. A. 8); *Oklahoma Transportation Co. v. National Labor Relations Board*, 140 F. 2d 509 (C. A. 5); *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533; *National Labor Relations Board v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50.

¹¹ See also cases cited, note 10, *supra*.

which these holdings were based, were reenacted in the amended Act, without material change.

Like the provisions of Title I of the Labor Management Relations Act, the provisions of Title II also apply without distinction to public utilities and private enterprises engaged in the production of goods. Thus, the provision of Section 203 (b), which directs the Federal Conciliation and Mediation Service to avoid attempting to mediate disputes which have only a minor effect on commerce if State or local conciliation services are available, applies whether public utilities or other enterprises are involved. And Sections 206-210, which prescribe procedures for strikes which may imperil the national health or safety, do not distinguish between public utilities and other types of enterprises.¹² These Sections may be invoked with respect to any industry "engaged in trade, commerce, transportation, transmission, or communication among the several States * * * or engaged in the production of

¹² The comparable provisions of the House Bill, H. R. 3020, Sections 203-206, applied only to "transportation, public utility, or communication services." The conference agreement extended the provisions to industries engaged in the production of goods as well. H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., pp. 63-64. The provisions of the House Bill could have been invoked whenever a labor dispute threatened cessation or curtailment of "interstate or foreign commerce" in "services essential to the public health, safety, or interest." Under the bill as enacted, the emergency provisions may be invoked only when a strike or lock-out would imperil the "national health or safety" (*ibid.*).

goods for commerce" (Section 206). They have already been invoked with respect to labor disputes in the atomic energy, meat packing, telephone, maritime and coal industries.¹³

2. THE STATE ACT

The Wisconsin Act declares (Section 111.50), that a labor dispute which threatens "interruption in the supply of an essential public utility service, to the citizens of this state * * * creates an emergency" warranting state intervention in the public interest. The Act is made applicable to employers "engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation, or communication" (Section 111.51 (1)). To prevent such interruptions, the state law absolutely prohibits strikes for higher wages and better working conditions by employees of private "public utility" employers; makes strikes in such industries "misdemeanors" (Section 111.62); and provides for the issuance of injunctions to restrain such strikes or threatened strikes (Sections 111.62, 111.63).

The Wisconsin Act (Section 111.50), further provides "settlement procedures for labor disputes between public utility employers and their employees in cases where * * * the parties are unable to effect such settlement." Pursuant to

¹³ Federal Mediation and Conciliation Service, First Annual Report (Gov't Print. Off., 1949), pp. 40-54; see also, Second Annual Report (Gov't Print. Off., 1950), pp. 23-32.

these procedures, the state board is directed to appoint a conciliator if "in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate" (Section 111.54). If, after the time allotted for conciliation, the conciliator reports to the state board that he is unable to effect a settlement, the board is authorized, "if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service," to appoint a board of arbitration (Section 111.55). The arbitrators so appointed are directed to hold hearings on the issues in dispute and "to promulgate a written decision and order, upon the issue or issues presented in each case" (Section 111.57 (1) and (2)).

The Act further provides that "Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute," the arbitrator, in arriving at a decision, shall give weight to a number of factors, including comparative wage rates in the local operating area, value of services to the consumer, and the overall compensation received by employees (Section 111.57 (3)). The statute further provides (Section 111.58) that

"The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union." The order of the board of arbitration, when filed with the clerk of the appropriate circuit court is declared to be binding upon the parties for a period of one year and governs the terms and conditions of employment unless set aside by the court on review (Sections 111.59 and 111.60).

3. THE PRACTICAL DIFFERENCES BETWEEN THE OPERATION OF THE STATE AND FEDERAL STATUTES—THE POSSIBILITY OF COMPULSORY ARBITRATION MAKES FREE COLLECTIVE BARGAINING INEFFECTIVE

The operations of the company here involved affect interstate commerce, and the terms of the National Act govern labor relations between the Company and its employees (*supra*, pp. 3-4). Pursuant to the terms of the National Act, after giving the employer sixty days notice of their desire to modify or terminate the contract which expired on December 31, 1948, and notifying both the Federal and State conciliation agencies within thirty days after the initial notice, and continuing in effect the terms of the agreement for sixty days following the original notice and until the contract expired, the union would have been free to strike in support of its lawful economic demands. Unless the strike affected not only this Company, but a substantial part of the public transportation industry, and imperiled the "na-

tional health or safety," the procedures of Sections 206-210 could not have been invoked with respect to such a strike.¹⁴ Under the State Act, however, participation in such a strike would be illegal, and the proposed strike was perpetually enjoined (No. 329, R. 155-157).

In bargaining over the terms of a new contract, under the provisions of the National Act, the parties are obliged to negotiate in good faith with a view toward reaching agreement, but neither party can be required to "agree to a proposal" or make a concession (Section 8 (d)). Under the State Act, if an impasse or stalemate is reached, the parties may be compelled to accept terms imposed by a State appointed board of arbitration. Under the scheme of the National Act, the parties understand that if an impasse or stalemate is reached, despite efforts of governmental agencies to resolve the dispute through mediation and conciliation, a strike may lawfully occur. Under the State Act negotiations are conducted with the understanding that there cannot be an ultimate resort to strike. Thus, under the State law, the ultimate sanction relied upon by

¹⁴ Perhaps the provisions of Sections 206-210 could not be invoked even if a strike affected all local privately owned public transportation systems in the country, since those provisions are applicable only to industries "engaged in * * * commerce * * * among the several states," and local transit systems, though "affecting interstate commerce" are not generally "engaged" therein.

Congress to induce the parties to reach agreement is eliminated.

Experience has shown that while under a system of free collective bargaining the parties by negotiation and compromise most frequently reach agreement without resort to strike, where compulsory arbitration is by law made the terminal point in the bargaining process, voluntary agreements are seldom reached. Studies of the effects of State statutes requiring compulsory arbitration of public-utility disputes reveal that the very existence of such statutes creates an atmosphere hostile to fruitful negotiations.¹⁵ From the first step in the bargaining process the minds of the negotiators are focused on the possibility of a public hearing, and an ultimate decision of the issues by an arbitration board. If either party believes or has reason to hope for a better settlement from the arbitrator than he could obtain at the bargaining table, he will not make a good faith attempt to settle, but will refuse to

¹⁵ MacDonald, *Compulsory Arbitration in New Jersey*, Proceedings of New York University Second Annual Conference on Labor, 625, 684, 701 (1949); Kennedy, *The Handling of Emergency Disputes*, Proceedings of the Second Annual Meeting of The Industrial Relations Research Association, 14, 19-23 (1949); Teller, *What Should Be Done About Emergency Strikes*, 1 Labor Law Journal, 263, 266-268 (1950); Schwartz, *The Use of Compulsion In Public Utility Labor Problems*, 267 (1950) (unpublished thesis, University of Wisconsin); *Constitutionality of State Statutes Compelling Arbitration of Labor Disputes*, 33 Marquette L. Rev. 48, 52 (1949).

make concessions and insist upon going to arbitration.¹⁶ (Cf. statement of Senator Taft, *infra*, p. 37). The Circuit Court found in this case that the Company insisted upon compulsory arbitration under the state Act (*supra*, p. 5), and that the Union was willing to continue negotiations but the Company was not (*supra*, p. 7, note 5). The charge filed by the Union with the National Board (notes 2, 3 and 4, *supra*), alleges that this factor was responsible for the failure of the parties to reach agreement in the instant case.

It has also been pointed out that where compulsory arbitration is available as a routine remedy in public-utility disputes, "A company may prefer to use compulsory arbitration * * * if it is of the opinion that the granting of what it considers a reasonable and necessary wage rate will necessitate an increase in the rates to be paid by the public for its service," since the Company may make a stronger case for a rate increase if a rise in labor costs results not from its voluntary agreement but from a state imposed settle-

¹⁶ Since the arbitrator under the Wisconsin statute may "not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union" (Section 111.58), there is incentive to both employers and labor organizations to force arbitration because the award cannot cover matters thought to constitute management prerogatives, or internal union affairs.

ment. Kennedy, *The Handling of Emergency Disputes*, Proceedings of the Second Annual Meeting of The Industrial Relations Research Association, 14, 23 (1949). This conclusion comports with the alleged practice of the public utilities in Wisconsin. See p. 5, n. 3, *supra*.

The prospect of securing better terms through arbitration often makes the position of the negotiators for the parties untenable. First, negotiators may fear to assume responsibility for any compromise. Professor Thomas Kennedy, reporting on the effects of New Jersey's public utility compulsory arbitration law, has stated:¹⁷

Management representatives point out that in some bargaining relationships any settlement reached by negotiation is subject to approval by the membership of the union. They complain that under these conditions union leaders avoid negotiating a settlement lest the membership turn down the settlement and insist on going to arbitration. The union leaders are said to fear that an arbitration board might recognize more than they had been willing to settle for in negotiations. If this happened the union leadership would be thoroughly discredited. On the other hand, management negotiators admit that they think it unwise to go to what they consider to be the limit

¹⁷ Kennedy, *The Handling of Emergency Disputes*, Proceedings of the Second Annual Meeting of Industrial Relations Research Association, 14, 21-22 (1949).

in order to negotiate a settlement so long as rejection by the union membership may be followed by compulsory arbitration.

Second, the parties hesitate to prune down their demands and suggest what appears to them a reasonable basis for settlement, for fear that the arbitrators will consider the offer as a springboard for ultimate compromise. Professor Kennedy illustrates this as follows (*ibid.*, p. 21):

A company and a union may both believe that a ten-cent increase is a reasonable settlement, yet the union will not budge from a demand of 20 cents and the company will not offer more than four cents. The company is afraid to move up to eight cents lest the union refuse to decrease its demands and the arbitrators consider eight cents to 20 cents instead of four cents to 20 cents as the area within which to compromise. For the same reason the union is afraid to move down to 15 cents.

Professor Kennedy concludes (*ibid.*) that "Negotiations are thus stymied and compulsory arbitration is both the cause and the result of the failure of free collective bargaining."¹⁸

¹⁸ Professor Kennedy also points out (*ibid.*, p. 22) that the prospect of compulsory arbitration creates obstacles to "washing out" the unessential demands of the parties. He notes: "the number of demands with which the parties enter negotiations has probably not increased but compulsory arbitration has made it much more difficult to eliminate the chaff and reduce the dispute to the two or three major issues. Each

Experience with labor relations in public utilities under the New Jersey compulsory arbitration law (N. J. Stat. Ann., Tit. 34, C. 13B (Supp. 1950)), reveals that companies which, prior to enactment of the law, over long periods of time, reached voluntary agreements with labor organizations through free collective bargaining, have been unsuccessful in doing so after enactment of the law. Professor Kennedy points out (*ibid.* pp. 20-21), that the Public Service Transportation Company, the largest operator of city busses in the United States, and the Amalgamated Association of Street, Electric Railway and Motor Coach Employees, AFL,

have been bargaining with each other for more than thirty years. During this entire period there have been no strikes or slow-downs since 1923. * * * One might

party now holds on to demands which would quickly be eliminated if free collective bargaining prevailed. After all, the arbitration Board, composed of men who are unfamiliar with the industry's and the union's problems, may grant these extra demands. Moreover, if the arbitration board rules against one of the parties on a number of minor issues it may be more inclined to favor it on the major issues in order to appear to be fair. Thus, if there is a possibility that the negotiations will not be successful, each party wants to have many demands to present to the arbitration board regardless of their merits. An examination of all the issues presented in the arbitration cases under the [New Jersey] Act indicates that this policy has been pursued to a considerable extent. As one of the public members of an arbitration board remarked, 'They come with everything, including the kitchen sink, properly dressed up.' (Footnotes omitted.)

have expected that such collective bargaining would have continued without much change under compulsory arbitration legislation. This has not been the case. * * *

In 1947, the first year that compulsory arbitration was effective, the parties were unable to reach an agreement. This was the first peacetime negotiation which failed since 1923. It was only the beginning. In 1948 and again this year the parties have had the major terms of their contracts determined by compulsory arbitration rather than by free negotiation. Thus, free collective bargaining has been ineffective in this relationship and the parties doubt * * * that it can ever be revitalized as long as the law is in effect. A number of other New Jersey utility companies, and their unions, have had the same experience. It is highly significant that without exception every company which had new contract terms settled by compulsory arbitration under the Act in 1947 repeated this performance in 1948.

The collective bargaining history of the Company and the Union here involved before and after passage of the Wisconsin Act (pp. 4-5, *supra*, No. 329, R. 105-106, 108, 141-144), is arrestingly parallel.

B. THE NO-STRIKE AND COMPULSORY ARBITRATION PROVISIONS OF THE WISCONSIN ACT ARE INCONSISTENT WITH THE SCHEME ADOPTED BY CONGRESS FOR REGULATING COLLECTIVE BARGAINING AND STRIKES IN PRIVATELY OWNED PUBLIC UTILITIES AND ALL OTHER INDUSTRIES SUBJECT TO THE NATIONAL ACT

1. THE TERMS OF THE ACT SHOW THAT CONGRESS REJECTED COMPULSORY ARBITRATION AS INCOMPATIBLE WITH THE SYSTEM OF FREE COLLECTIVE BARGAINING

The system of compulsory arbitration and denial of the right to strike which Wisconsin applies to labor relations in "public utility" industries is antithetical to the system of collective bargaining which Congress deliberately chose to apply to these as well as all other enterprises subject to the National Act. The terms of the National Act themselves show that Congress rejected governmental imposition of terms and conditions of employment in favor of a system of free collective bargaining in which terms and conditions of employment are fixed by voluntary agreement between employers and bargaining representatives of employees. In Section 201 (b) Congress declared that the proper function of governmental officials was to assist in the voluntary settlement of issues between employers and employees through the collective bargaining process, by providing facilities for "conciliation, mediation, and *voluntary arbitration*" [italics added]. Highlighting its rejection of compulsory arbitration, Congress, in defining the duty to bargain (Section 8 (d)), reserved to both employers and labor organizations the right to refuse to

agree to any economic demand or to make a concession. The National Board is thereby precluded from "determining the merits of the positions of the parties" or compelling the parties to agree to or abide by any particular terms or conditions of employment. H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., p. 34. Congress likewise emphasized that the Director of the Federal Mediation and Conciliation Service was precluded from compelling the parties to a labor dispute, even in national emergency cases, to accept any particular terms, by providing that "Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service" (Section 209 (a), cf. Section 203 (c)). Further indicating its opposition to the imposition of settlement terms by any governmental agency, Congress in Section 206 provided that the reports of boards of inquiry convened in national emergency cases "shall include each party's statement of its position but shall not contain any recommendations."¹⁹

2. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS REJECTED PROPOSALS FOR COMPULSORY ARBITRATION OF PUBLIC UTILITY DISPUTES ON THE MERITS

In the *O'Brien* case, 339 U. S. 454, 458, note 5, this Court regarded as significant the fact that the

¹⁹ A contrary provision, authorizing the making of recommendations was contained in the House Bill (Section 204 (c)), but the House proposal was rejected in conference. H. Conf. Rep. No. 510 on H. R. 3020, pp. 63-64.

legislative history showed that Congress had considered but rejected on the merits cooling-off and strike vote provisions similar to those which Michigan in that case applied to an enterprise subject to the National Act. Congress also considered and rejected proposals for compulsory arbitration of disputes over wages and hours in public utilities, the very plan of regulation which Wisconsin has here attempted to impose. And here, as in *O'Brien*, the legislative history clearly shows that the "proposal was rejected on the merits, and not because of any desire to leave the states free to adopt it."

In a comprehensive statement to the Senate (Leg. Hist. of the Labor Management Relations Act, pp. 1007-1008, 93 Cong. Rec. 3835), a portion of which this Court quoted in the *O'Brien* case, 339 U. S., at 457, note 3, Senator Taft, speaking for the Senate Committee which he headed, declared:

* * * the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. *We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the*

exercise of such right. In the long run, I do not believe that that right will be abused. In the past few disputes finally reached the point where there was a direct threat to ~~and~~ defiance of the rights of the people of the United States.

We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. But if we impose *compulsory arbitration*, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy.

I feel very strongly that so far as possible we should avoid any system which attempts to give to the Government this power finally to fix the wages of any man. Can we do so constitutionally? Can we say to all the people of the United States, "You must work at wages fixed by the Government?" I think it is a long step from freedom and a long step from a free economy to give the Government such a right. [Italics added.]

Addressing himself specifically to proposals for compulsory arbitration in public utilities, Senator Taft continued:

It is suggested that we might do so in the case of public utilities; and I suppose the argument is stronger there, because we fix the rates of public utilities, and we might, I suppose, fix the wages of public-utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that it is necessary to do is to forbid strikes, fix wages, and compel men to continue working, without consideration of the human and constitutional problems involved in that process.

If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. *So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation.* [Italics added.]

Senator Taft went on to outline the provisions in the proposed statute for dealing with national emergencies, and continued (*ibid.*):

We did not feel that we should put into the law, as a part of the collective-bargaining machinery, *an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining.* If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.

The Senate Report on the bill (S. Rep. No. 105 on S. 1126), emphasizes the determination of Congress to avoid compulsory arbitration and other forms of governmental dictation of the terms of settlement of labor disputes. The Report, declaring that both management and labor "must recognize that the rights of the general public are paramount," makes clear that (S. Rep. No. 105, p. 2; Leg. Hist., p. 408):

The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining. Government decisions should not be substituted for free agreement * * *

The Committee Report also shows that it was Congress' dissatisfaction with the system of compulsory arbitration which led to its rejection. The Report states (*ibid.*, pp. 13-14; Leg. Hist., pp. 419-420):

In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of the suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation.

Under the exigencies of war the Nation did utilize what amounted to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Government, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining. It is difficult to see how such a system could be operated indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces. Moreover, the wartime experiment of the 30-day wait-

ing period under the War Labor Disputes Act was not a happy one, since it was too frequently used as a device for bringing to a rapid crisis disputes which might have been solved by a patient negotiation. For similar reasons except in dire emergencies the establishment of fact-finding boards or over-all mediation tribunals also cause dubious results. Recommendations of such bodies tend to set patterns of wage settlements for the entire country which are frequently inappropriate to the peculiar circumstances of certain industries and certain classes of employment.

It is our conclusion that by modifying some of the practices under the Wagner Act which tend to destroy the balance of power in collective-bargaining negotiations by restraining one party to a dispute without restraining the other, Congress would go a long way toward making collective bargaining the most effective method of solving the industrial relations difficulties.

The legislative history also shows that because of its faith in collective bargaining as the appropriate method of resolving labor disputes between private employers and their employees, Congress refused to apply any different rule to privately owned public utilities than to other private enterprises although such treatment was advocated by some on the ground that strikes which resulted in interruption of public utility service affected

the public more seriously than strikes in other industries. Bills based on the premise that strikes which disrupted public utility service should be treated differently than strikes in other industries, and which provided that public utility strikes should be enjoined either temporarily or permanently, and that compulsory arbitration or fact finding procedures should be applied to public disputes, were introduced in the 80th Congress. See H. R. 17, 34, 75 and 76, 80th Cong., 1st Sess., 93 Cong. Rec. A-1007-1009, Leg. Hist., p. 577. Compare the statement of Congressman Case which was submitted to the House Committee on March 10, 1947, in support of these proposals, reprinted in 93 Cong. Rec. A-1007-1009; Leg. Hist., pp. 557-581; see also 93 Cong. Rec. 3123-6, 3513, 3524; Leg. Hist., pp. 586, 588, 589-590, 669, 687. Compare also the statement of Senator Wiley of Wisconsin, that "wherever the public interest is threatened by a proposed strike in a public utility like electricity, transportation, telephone, gas, or a key Nation-wide industry like coal or steel, Congress should set up means for compulsory arbitration of disputes. * * * Strikes in utilities *and* key Nation-wide industries must be outlawed. The public welfare must be protected." [Italics added.] 93 Cong. Rec. A-1035 (Leg. Hist., p. 993).

Witnesses who testified before the House and Senate Committees objected vigorously to all

these proposals, and particularly to those which would have outlawed strikes and imposed compulsory arbitration, on the ground that "compulsory arbitration is the antithesis of free collective bargaining;"²⁰ that compulsory arbitration had been proved unsuccessful in averting public-utility strikes in those jurisdictions, both

²⁰ Testimony of Hon. Lewis B. Schwellenbach, former Secretary of Labor, Hearings before the House Committee on Education and Labor on Bills to amend and repeal the National Labor Relations Act, 80th Cong., 1st Sess., pp. 2994, 3033. Mr. Schwellenbach went on to say:

"* * * Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminates free collective bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretense of bargaining in anticipation of a more favorable award from an arbitrator than would be realizable through their own efforts.

"The net result would be a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures, and it is obvious that with the growth of such an attitude, the use of conciliation and mediation procedures would decline concurrently."

To the same effect, see statement of William Green, President, American Federation of Labor, Hearings, *op. cit.*, *supra*, pp. 1630, 1658; brief submitted by Walter Reuther, President, United Automobile, Aircraft, Agricultural Implement Workers of America, Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., pp. 1309, 1326.

here and abroad, in which it had been tried;²¹ and that relatively few public-utility disputes result in loss of working time due to strikes.²²

In the light of these proposals and the extensive debate upon them, it is clear that Congress did not regard the "inconvenience and perhaps danger" to the public which may result from public-utility strikes (statement of Senator Taft, *supra*, pp. 34-35), as warranting interference with the system of free collective bargaining in public utilities, and that it was precisely because it desired to preserve free collective bargaining in these industries that Congress refused to incorporate in the law "an ultimate resort to compulsory arbitration, or to seizure, or to any other action" (*supra*, p. 37), measures which had been proposed particularly for public-utility disputes. S. Rep.. No. 105, *supra*, pp. 38-39. Compare

²¹ See testimony of Senator Wayne Morse, Hearings before the Senate Committee on Labor and the Public Welfare, 80th Cong., 1st Sess., p. 677; Testimony of Ludwig Teller, Hearings *op. cit.*, *supra*, pp. 247, 267; Testimony of Hon. Lewis B. Schwellenbach, former Secretary of Labor, Hearings before the House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 2994, 3032; Testimony of William Green, President, American Federation of Labor, Hearings, *op. cit.*, *supra*, 1630, 1658; Testimony of J. A. Beirne, President, National Federation of Telephone Workers, Hearings, *op. cit.*, *supra*, pp. 2203, 2206, 2207.

²² See statement and accompanying statistical table submitted by Joseph A. Beirne, President of the National Federation of Telephone Workers, to the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pp. 1203, 1209, 1219, and his testimony before the House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 2203, 2240.

Statement of Senator Morse, Hearings before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., p. 677.

C. THE STATES ARE NOT EMPOWERED TO OVERRIDE THE DELIBERATE JUDGMENT OF CONGRESS BY OUTLAWING STRIKES AND SUBSTITUTING COMPULSORY ARBITRATION FOR FREE COLLECTIVE BARGAINING IN LOCAL PUBLIC UTILITIES SUBJECT TO THE NATIONAL ACT

In *United Automobile Workers v. O'Brien*, 339 U. S. 454, 456-457, this Court said:

Congress has not been silent on the subject of strikes in interstate commerce. In the National Labor Relations Act * * * Congress safeguarded the exercise by employees of "concerted activities" and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act. It established certain prerequisites, with which appellants complied, for any strike over contract termination or modification. § 8 (d) These include notices to both state and federal mediation authorities; both did participate in the negotiations in this case. In provisions which did not affect appellants, Congress forbade strikes for certain objectives and detailed procedures for strikes which might create a national emergency. §§ 8 (b) (4), 206-210. *None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages.* Congress has occupied this field and closed it to state regulation. *Plankinton Packing Co. v. Wisconsin Board*, 338 U. S. 953 (1950); *LaCrosse*

Telephone Corp. v. Wisconsin Board, 336 U. S. 18 (1949); *Bethlehem Steel Co. v. New York Labor Board*, 330 U. S. 767 (1947); *Hill v. Florida*, 325 U. S. 538. [Italics supplied.]

Citation of the *LaCrosse Telephone* case, a case involving a local Wisconsin public utility, in the *O'Brien* opinion, indicates that this Court did not regard local public utilities as exempt from the principle enunciated in that case. The suggestion in the opinion of the Supreme Court of Wisconsin in *Wisconsin Board v. Milwaukee Gas Light Company and United Gas, Coke and Chemical Workers of America*, decided November 8, 1950, 27 LRRM 2091, 2094, not yet officially reported, certiorari granted December 11, 1950, No. 438, that the *O'Brien* rule is inapplicable to private-utility companies because such companies "perform functions which the state might perform directly" is plainly untenable. Exemption under the National Act extends only to activities in which a "state or political subdivision thereof" does engage directly. (Section 2 (2) and 2 (3).) The functions here involved are performed not by the state or state instrumentalities, but by private corporations operating for profit. The only private organizations which Congress removed from the reach of federal law are those which operate hospitals, and, of these, only not-for-profit corporations and associations were exempted. A private corporation is not transformed

into a state instrumentality by the grant of a charter and permission to operate as a monopoly, or by state regulation of its rates or services. See, *Buckstaff Co. v. McKinley*, 308 U. S. 358, 362-363, and cases there cited; *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128-129; *Alabama v. King & Boozer*, 314 U. S. 1, 13. The Wisconsin Act undertakes to regulate labor relations between private employers and their employees, not between the state and state employees. The very terms of the state law refute the claim that private public utilities are "state agencies", for the Act exempts from its operation, "the state or any political subdivision thereof" (Section 111.51 (1)). If utility companies were treated as state agencies under the state law, the law would have no scope for application. By applying the state Act to the Company here involved, Wisconsin has left no room for doubt that it does not regard enterprises such as these as the equivalent of "the state or any political subdivision thereof."

That Congress is empowered to regulate such private enterprises even though they perform functions "in which states have traditionally engaged" is not open to question. *United States v. California*, 297 U. S. 175, 185. In choosing to regulate labor relations in all industries "affecting" interstate commerce as well as industries "engaged in interstate commerce," Congress deliberately subjected to national law industries in which work stoppages could be expected often

to have far greater effect upon local communities than upon the nation as a whole. Local public utilities, such as the Company involved in this case, fall in that category. Congress' concern that enterprises such as these should not be subjected to regulations inconsistent with the policy of the national Act is apparent from the provisions of Section 10 (a) of the amended Act, which authorize cession of jurisdiction by the National Board to state agencies over cases involving "mining, manufacturing, communications, and transportation" when "predominantly local in character", but only where the applicable state law is not "inconsistent with the corresponding provisions of this Act." See also, H. Rep. No. 1147, 74th Cong., 1st sess., p. 9; ~~K~~ Rep. No. 245, 80th Cong., 1st sess., p. 40; 93 Cong. Rec. 3559.

In the *O'Brien* case, this Court held the Michigan cooling-off and majority strike vote provisions invalid for the additional reason that "The federal Act * * * permits strikes at a different and usually earlier time than the Michigan law; and it does not require majority authorization for any strike." 339 U. S., at p. 458. The provisions of the Wisconsin statute here in issue make far deeper inroads upon "federally protected labor rights" (*ibid.*), than did the Michigan Act. The Wisconsin Act does not merely postpone and condition the right to strike for

higher wages; it destroys that right completely.

We have shown above that Congress deliberately chose to preserve the right of employees of public utilities to strike and deliberately rejected compulsory arbitration as a method of resolving disputes over terms and conditions of employment in public utilities, pp. 32-42, *supra*. Nothing in the terms of the Act or its legislative history suggests that despite its rejection of these techniques on the merits Congress nevertheless intended to leave the States free to adopt them. Having refused to apply compulsory techniques even to avoid great hardships to the entire Nation, it can hardly be suggested that Congress authorized their application by the States to avoid lesser hardships to local communities. And it is noteworthy that a large majority of the States apparently agree with Congress that measures such as these are neither desirable nor necessary to protect the public interest, for only a minority have enacted legislation outlawing strikes and providing for compulsory arbitration in public utilities.²³

²³Only six states in addition to Wisconsin have adopted laws providing for compulsory arbitration of public utility disputes. Florida: *Fla. Stat. Ann.* (Supp. 1948) § 453.01 to 453.18; Indiana: *Ind. Ann. Stat.* (Burns Supp. 1949) § 40-2401 to 40-2415; Kansas: *Kan. Gen. Stat. Ann.* (1935) § 44-601 to 44-628; Nebraska: *Neb. Rev. Stat.* (Supp. 1949) § 48-801 to 48-823; New Jersey: *N. J. Stat. Ann.* (Supp. 1950) Tit. 34: C.13B; Pennsylvania: *Pa. Stat. Ann.* (Supp. 1949) Tit. 43, § 215.1 to 215.5.

It is also to be noted that the Wisconsin statute, in establishing standards for arbitrator's awards, in effect redefines, and significantly narrows the subject matter of compulsory collective bargaining under federal law. Thus, in prohibiting the arbitrator from making awards which infringe on "management prerogatives", the Wisconsin Act assures employers that they will not be com-

Six states provides for seizure of public utilities in the event of labor disputes which threaten interruption of service. Kansas: *Kan. Gen. Stat. Ann.* (1935) § 44.620; Massachusetts: *Mass. Gen. Laws* (Supp. 1948) (C. 150 B §§ 1 to 7; Missouri: *Mo. Rev. Stat. Ann.* (Supp. 1950) § 10178.119; New Jersey: *N. J. Stat. Ann.* (Supp. 1950) 34: C 13B-13; North Dakota: *N. D. Rev. Code* (1943) § 37-0106; Virginia: *Va. Code Ann.* (1950 §§ 40-75 to 40-95.

The coverage of these provisions varies widely. The Kansas statute applies not only to enterprises commonly regarded as "public utilities," but also to the manufacture of food and clothing, and the mining or production of fuel. *Kan. Gen. Stat. Ann.* (1935), § 44-603. The North Dakota statute applies to coal mining. *N. D. Rev. Code* (1943), § 37-0106. The Massachusetts Act applies to the production and distribution of food, fuel and hospital or medical services. *Mass. Gen. Laws* (Supp. 1948), C. 150 B, § 2. For a comprehensive survey of the state laws and their provisions see Roberts, *Compulsory Arbitration of Labor Disputes in Public Utilities* (University of Hawaii Industrial Relations Center (March, 1949), 4-22. In a recent article published under the same title, 1 *Labor Law Journal* (1950), 694, 700, Roberts concludes that "It has still to be proven that those states that have special statutes [governing public utility disputes] are better protected than those that rely almost entirely on voluntary collective bargaining and voluntary arbitration." Roberts also observes that "compulsory arbitration has not eliminated industrial disputes in those countries where it has been applied." (*Ibid.*, p. 704.)

pelled to reach agreement with the representative of their employees, and hence need not bargain with respect to, certain subjects which are matters of mandatory bargaining under federal law. The conflict is illustrated in the instant case by the arbitrator's action on the Union's request that certain types of employees be maintained on various shifts. The Board of Arbitration refused to grant this request on the ground that to do so would interfere with management's prerogative (No. 330, R. 198). Work schedules and hours and composition of shifts have been held by the National Board to be among the subjects on which bargaining is mandatory under the National Act. *American National Insurance Co.*, 89 N. L. R. B., No. 19; *Woodside Cotton Mills*, 21 N. L. R. B. 42, 54, 55; cf. *Wilson & Co.*, 19 N. L. R. B. 990, 999, enforced, 115 F. 2d 759 (C. A. 8). Thus, under national law, in contrast to the state act, the employer could not lawfully have refused to bargain with the Union on such an issue.

Had Congress intended to permit the states to apply to industries within their borders measures which it had rejected it would clearly have provided for reservation of such power to the states. Congress realized that "by the Labor Act Congress preempts the field that the act covers insofar as commerce within the meaning of the act is concerned" (H. Rep. No. 245, on H. R. 3020, p. 44), and consequently it took care

to preserve to the states whatever jurisdiction it desired to permit them to retain. See Section 10 (a). Section 14 (b), which expressly reserves to the states power to prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment, was enacted because Congress believed that such a "special provision" was necessary "to give to the States a concurrent jurisdiction in respect of closed-shop and other union-security arrangements" (H. Rep. No. 245, on H. R. 3020, 80th Cong., 1st Sess., p. 40). Similarly, because Congress was advised that the effect of requiring dispute notices to be filed only with the Federal Mediation and Conciliation Service would be to exclude state agencies from offering conciliation or mediation services in disputes subject to the Act (Hearings before the Senate Committee on Education and Labor, 80th Cong., 1st Sess., p. 563), Congress specifically provided in Section 8 (d) for the service of notices upon state as well as upon federal agencies, and in Sections 202 (c) and 203 (b) provided for cooperation between the federal and state conciliation authorities.

This is not to say, of course, that the states are precluded from taking any action to avoid or settle strikes in local public utilities or other local industries which may have severe repercussions on the health, safety or welfare of local communities. Nor does this case present the

question whether, where stoppage of essential public utility service endangers the health and safety of local communities, the states may invoke measures not basically inconsistent with the federal statutory scheme. Although in general the federal statute occupies the field of labor relations affecting interstate commerce, we do not contend that Congress meant to bar the states from dealing with every local emergency in view of the lack of any clear manifestation of intention to that effect. See especially Section 206. How far the states should be permitted to go need not be determined here.

Congress in the amended Act recognized the interests of the states in avoiding hardships of this character, and assigned to state and local governments a significant role in seeking to prevent and alleviate such strikes. Congress sought to encourage state and local agencies to participate fully within the framework of national policy in the "settlement of issues between employers and employees through collective bargaining" (Section 201 (b)), by offering conciliation, mediation and voluntary arbitration services to the parties to labor disputes. In deference to state agencies created for this purpose, Congress instructed the Director of the Federal Mediation and Conciliation Service to "avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other

conciliation services are available to the parties" (Section 203). And to assure that the state agencies would have adequate opportunity for bringing about voluntary settlements, thereby avoiding strikes, Congress in Section 8 (d) required the parties to contract disputes to notify the state agencies thirty days before the contract expires or before a strike is to take place. Pursuant to these provisions, state agencies, like the Federal Mediation and Conciliation Service, are authorized (Section 203 (c)), to "seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot." They are not authorized, however, to invoke compulsory measures which Congress regarded as inconsistent with the practice and procedure of collective bargaining, even to avoid emergencies. The basic principle should be that they cannot use means which are inconsistent with federal policy, and certainly not those which Congress has itself specifically rejected for emergency situations. This might mean that the states could adopt for local utility emergencies measures not impeding collective bargaining to a greater extent than those employed by Congress for dealing with national emergencies.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

Nos. 329-330

October Term—1950

**AMALGAMATED ASSOCIATION OF
STREET, ELECTRIC RAILWAY
AND MOTOR COACH EMPLOYEES,
OF AMERICA, DIVISION 998, et al.,**

Petitioners,

vs.

**WISCONSIN EMPLOYMENT
RELATIONS BOARD, et al.,**

Respondents.

On Writ of
Certiorari to the
Supreme Court
of the
State of Wisconsin

**BRIEF FOR STATE OF NEW JERSEY
AS AMICUS CURIAE**

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Statement

In their petition for certiorari the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998 et al., the Petitioners herein, urged the importance of the issues involved in the instant appeals in that some eleven States have adopted legislation similar to that which is the subject matter of these appeals. The State of New Jersey is one of those States. Because of the importance to the State of New Jersey of the basic issues presented in these cases, this State prays the indulgence of this Court in submitting this brief *amicus curiae* in support of the right of a sovereign State to adopt regulatory legislation designed solely to assure to the people of this State an uninterrupted supply of public utility services deemed by the said State to be essential to the health and welfare of its people.

The basic purpose behind the enactment of the National Labor Relations Act was to provide a forum for the settlement of labor disputes at the federal level. The effect upon interstate commerce of labor disputes was the justification for this undertaking. The situation having to do with labor disputes in public utilities is in no wise similar. Here the basic purpose is not the settlement of labor disputes but rather the continuance of essential public utility services. Settlement of labor disputes in public utilities is merely incidental to such basic purpose. The New Jersey Legislature was concerned with preventing the cessation of or crippling interference with public utility services declared by the Legislature to be life essentials and concerning which New Jersey's highest Court said in *Van Riper v. Traffic Telephone Workers' Federation of New Jersey*, 2 N. J. 335, 345 (Sup. Ct., 1949):

“Where by reason of a strike, work stoppage or lockout the flow of the services of any of these essen-

tials of community life is halted or impaired the State has not only the right but a pressing duty to step in and prevent the continuance of such stoppage or impairment and to take appropriate measures to restore them. If instead of a stoppage or curtailment of essential services there is an imminent danger of their being halted or curtailed, the State has the right as well as the obligation of preventing the occurrence of any such catastrophe, *Cf. United States v. United Mine Workers*, 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947)."

Although New Jersey realizes that this Court cannot consider the merits of the New Jersey legislation on this appeal, the New Jersey legislation is set forth at length in the appendix to this brief and is referred to hereafter for the purpose of demonstrating that (1) the purpose of this type of legislation is that which has just been stated; (2) we are not here concerned with the usual issues of a labor dispute affecting only the parties thereto but rather with the effect of certain disputes upon outsiders, the general public; (3) the same basic issues are presented by the New Jersey and Wisconsin statutes; and (4) the anti-strike and compulsory arbitration questions are not independent issues arising separately and apart from the question of the power of a state to enact protective legislation under its police power but are only subordinate issues in that such matters may constitute a limitation upon the lawful means a State may otherwise use to attain a lawful objective.

The Petitioners have complained because certain States have adopted laws which provide for compulsory arbitration and which prohibit the right to strike in industries over which the National Labor Relations Board has asserted jurisdiction.

The New Jersey statutes provide for a sixty day notice of intention to strike. N. J. S. A. 34:13B-18; App. page viii. In case of a strike or lockout, seizure by the State is pro-

vided. N. J. S. A. 34:13B-13; App. page v. Strikes are made unlawful after seizure. N. J. S. A. 34:13B-19; App. page ix. Provision is made for the appointment of a Board of Arbitration, hearing and determination. N. J. S. A. 34:13B-20, 21, 23, 27; App. pages ix to xv. Penalties, are prescribed for unlawful lockouts, strikes or work stoppage. N. J. S. A. 34:13B-24; App. page xiii. It is apparent that the basic purpose of the legislation is to prevent an interruption or curtailment of essential public utility services. The New Jersey Courts have so found.

The basic question before this Honorable Court is whether a sovereign State is authorized under its police power to so regulate public utilities and their employees as to prevent work stoppages in intrastate services furnished by public utility companies and deemed by a state legislature to be life essentials. Determination of this basic question involves the determination of the question whether the individual rights of employer and employees are paramount to the vital interests of the public as a whole.

- It may not successfully be argued that the general public is not vitally concerned with a continuance of the flow of essential public utility services. Since the need is present, it would appear that the primary objective of such regulatory legislation is within the police power of a State and that the only question left to be determined would be whether the means utilized to accomplish the end are reasonable. New Jersey will urge upon this Court the reasonableness of the means.

The State respectfully suggests consideration of the following:

- (1) That the purpose motivating the adoption of the National Labor Relations Act was the settlement of labor disputes, whereas the instant legislation is primarily concerned with the interests of outside parties, the public, in the maintenance of essential utility services;

- (2) That the Labor Management Relations Act concerns itself primarily with the affairs of the parties to such labor disputes whereas the instant legislation seeks to protect innocent bystanders from certain dangers which will result from a disagreement of the parties;
- (3) That the State has its intrastate commerce which it may protect under its police power notwithstanding federal legislation with respect to interstate commerce, subject only to the limitation that in so doing the State does not interfere with, hamper or impede interstate commerce.
- (4) That there must be clear and convincing proof of a congressional intent to limit the power of the State to protect the health and welfare of its people.
- (5) That there is no provision in the federal legislation for protection of the people in the event of an emergency at the State level and Congress could, therefore, not have intended to preempt the field with respect to settlement of labor disputes in public utilities which endanger the welfare of the people.

ARGUMENT

POINT I

Reasonable regulations designed to prevent an interruption or curtailment of essential intrastate services furnished by public utility companies under State franchises may be adopted by a State under its police power.

The Pétitioners have pointed out that, in *National Labor Relations Board v. Baltimore Transit Co.*, 140 F. 2d 51, 53 (C. C. A. 4th, 1944), cert. den. 321 U. S. 795, it was

held that the National Labor Relations Act was applicable to a utility doing an intrastate business because of its effect upon interstate commerce. The Court cited a number of cases including *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1936) wherein this Court said (p. 30):

"The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce among the several States and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system."

The Court was there seeking to determine the right of the Federal government to regulate certain labor relations. But the need of recognizing the distinction between what is national and what is local is the more important in the instant case for the reason that we are not here primarily concerned with the exclusive right of the Federal government to determine labor disputes but rather with the more narrow and basic question whether a sovereign State may adopt regulations which are designed solely to prevent an interruption or curtailment of essential public utility services.

The needs of the State, the dangers with which the State would be constantly confronted without such regulation, are not illusory, problematical or fanciful. They are real and were so recognized by New Jersey's highest Court, which, in *Van Riper v. Traffic Telephone Workers' Federation*, *supra*, said through Chief Justice VANDERBILT (p. 345):

"Where by reason of a strike, work stoppage or lockout the flow of the services of any of these essentials of community life is halted or impaired the State has not only the right but a pressing duty to step in and prevent the continuance of such stoppage or impairment and to take appropriate measures to

restore them. If instead of a stoppage or curtailment of essential services there is an imminent danger of their being halted or curtailed, the State has the right as well as the obligation of preventing the occurrence of any such catastrophe. Cf. *United States v. United Mine Workers*, 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947)."

A number of the States have determined that the welfare of the people requires that the public be protected against the dangers incident to an interruption or curtailment of named essential public utility services. The State of New Jersey respectfully submits that regulations protecting the public against such dangers are within the police power of the State.

It has been said that the police power is the least limitable of the powers of government. *Sligh v. Kirkwood*, 237 U. S. 52, 59 (1914); *Hall v. Geiger Jones Co.*, 242 U. S. 539, 548 (1916); *Queenside Halls Realty Co.*, 328 U. S. 80, 83 (1945).

The Legislatures of several States have determined that a public need exists with respect to a continuance of essential utility services. The highest Courts of Wisconsin and New Jersey have confirmed the need in their respective States. In *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, 258 (1930) it was held that the action of a state legislature in enacting a police regulation attacked as unreasonable, and of the highest court in the state in upholding its validity, indicates the evils for which it is an appropriate remedy.

It is respectfully submitted that a State is authorized under its police power to adopt regulations reasonably designed to assure to its people an uninterrupted flow of essential intrastate services furnished by public utility companies operating under state franchises.

a) The right to undertake a contract of employment in a public utility is subordinate to a valid exercise of the police power.

There is nothing complex about the instant problem. In order to assure the continuance of public utility services deemed by the Legislature to be "life essentials", the Legislature has simply prescribed certain terms upon which utility companies and their employees are permitted to enter into a contract of employment affecting intra-state commerce. Charges of involuntary servitude and of denial of civil liberties are made for the purpose of beclouding the basic issue of whether the State is authorized under its police power to regulate such contracts of employment where the public interest in the maintenance of the flow of essential services requires it.

In *Veir v. Sixth Ward Association*, 310 U. S. 32, 38 (1940) this Court said:

"In *Home Building & Loan Association v. Blaisdell* this Court considered the authority retained by the state over contracts 'to safeguard the vital interests of its people.' The rule that all contracts are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety. It extends to economic needs as well. Utility rate contracts give way to this power, as do contractual arrangements between landlords and tenants."

This was but a reassertion of the broad principle enunciated in *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 558 (1913) as follows:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can

neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. . . . And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law."

See also *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 375, 376 (1918).

The rule was established at an early date by this Court in *Manginault v. Springs*, 199 U. S. 473, 480 (1905) wherein it was said:

"This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contract between individuals."

Under the police power, this Court has time after time sustained the power of the State to regulate rates to the end that the public should have the benefit of just and reasonable rates. The rationale was that the public would be burdened by exorbitant rates. It is inconceivable that it could be held that the public could be protected against the burden of excessive rates for certain utility services but that the State is without power to protect the public against the dangers incident to interruption and curtailment of those same services—that the State may protect the few who may not be able to afford higher rates but may not protect the many against a total loss of service.

In *West Virginia State Board v. Barnette*, 319 U. S. 624, 639 (1943), Mr. Justice JACKSON said for this Court:

"The right of the State to regulate, for example, a public utility may well include, so far as the due process clause is concerned, power to impose all

of the restrictions which a legislature may have a 'rational basis for adopting.' "

It is respectfully submitted that the regulation of the contract of employment between a utility company furnishing essential services and its employees for the purpose of assuring a continuance of the flow of essential services is a reasonable exercise of the police power. A state legislature faced with the dangers attendant upon interruptions in such services certainly has a "rational basis for adopting" such regulatory measures.

b) All other constitutional guaranties are subject to restraint where such restraint is essential to the common good.

In their eagerness to continue to resort to what Mr. Justice FRANKFURTER has seen fit to describe as "the more primitive method of trial by combat" (*American Federation of Labor v. American Sash & Door*, 335 U. S. 538, 544 (1948)), opponents of this remedial legislation have sought to treat the matter as if it were not a simple contract problem, but one involving the so-called personal guaranties. But personal rights are not absolutes.

This Court said in *Near v. Minnesota*, 283 U. S. 697, 708 (1930):

"Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse."

In *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722, 725 (1941), it was said for the Court:

"* * * But the circumstances that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to

impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of 'liberty', the question always is whether the state has violated 'the essential attributes of that liberty'. — Mr. Chief Justice HUGHES in *Near v. Minnesota*, 283 U. S. 697, 708, 51 S. Ct. 625, 628, 75 L. Ed. 1357. While the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies 'to promote the health, safety, morals, and general welfare of its people' * * *. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise.' 283 U. S. at page 707, 51 S. Ct. at page 628, 75 L. Ed. 1357. 'The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.' "

The State respectfully submits that all constitutional guaranties of both employer and employee must yield to the paramount needs of the public. It must be so if we will exist for as was said by this Court in *Cox v. New Hampshire*, 312 U. S. 569, 575 (1941):

"Civil liberties, as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

c) There is no provision of the federal law which gives to the several States the protection intended by the regulatory legislation in question.

Whether the Federal Government would be authorized to enact legislation designed to assure to the States a continuance of essential intrastate public utility services or whether the State alone has that power under the Ninth

and Tenth Amendments, we need not now determine. It is sufficient to say that the Federal Government has not attempted to do so.

In *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*, 335 U. S. 525, 536 (1948), this Court said:

"This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. * * * Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

In *Skiriotes v. Florida*, 313 U. S. 69, 75 (1940), it was said:

"According to familiar principles, Congress having occupied but a limited field, the authority of the State to protect its interests by additional or supplementary legislation otherwise valid is not impaired."

This was said with respect to the sponge industry at best but a small portion of the economy of the State of Florida. The legislation under review in the instant case deals with the welfare of all the people of the several States enacting such legislation.

In *People of the State of California v. Thompson*, 313 U. S. 109, 115 (1940), this Court recognized the power in the States under certain circumstances to regulate even interstate commerce saying:

"It has uniformly held that in the absence of pertinent Congressional legislation there is constitutional power in the states to regulate interstate commerce by motor vehicle wherever it affects the safety of the public or the safety and convenient use of its highways, provided only that the regulation does not in any other respect unnecessarily obstruct interstate commerce."

The State of New Jersey respectfully submits that Congress has not sought to make provision for protection to the States against the dangers incident to interruption and curtailment of essential utility services and the right of the States to make reasonable regulations to attain such end remains unimpaired.

In conclusion of this point the State of New Jersey respectfully maintains that a State may adopt reasonable regulations designed to assure to its people a continuance of the flow of essential intrastate public utility services furnished under governmental franchises of such State.

POINT II

As a necessary incident to a State's power to assure a continuance of the flow of essential public utility services, a State may prohibit strikes in public utility plants which would cause an interruption or curtailment of such essential services.

In sustaining the authority of a State to adopt regulatory legislation designed to prevent work stoppages in public utilities, the New Jersey Supreme Court spoke of the imminent danger of a cessation or curtailment of such services as being "the occurrence of any such catastrophe." *Van Ripper v. Traffic Tel. Workers Federation, supra.* The State of New Jersey respectfully submits that every threat

of a work stoppage in plants furnishing essential services constitutes a threat to the welfare of all of the people affected. The State having the authority under the police power to assure a continuance of essential services, it should necessarily follow that the State may lawfully prohibit any strike which will cause an interruption or curtailment of such services.

Each State must determine just how it will meet any threat. It is respectfully submitted that this Court, having determined that the State may regulate concerning the adequacy of the supply of the service, should, in order to strike that nice balance which should exist between the national and state authority in this most sensitive area of government, hold that it is the right of the States to determine the propriety of specific regulations, designed to achieve such purpose.

For the information of this Court, the State of New Jersey has met the problem by forbidding strikes in public utilities only after a finding by the Governor that

“the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility.”

N. J. S. A. 34:13B-13; App. page vi.

While it would appear that the New Jersey Legislature intended the compulsory arbitration provision to provide some measure of substitution for the right to strike, nevertheless the two need not be read together. It is conceivable that this Court, while holding that the State is authorized to forbid interruption or curtailment of essential utility services including the prohibition of strikes in intrastate service, could hold that any labor disputes, even though but indirectly affecting interstate commerce, must be settled under the Federal jurisdiction. The State therefore respectfully submits that the second question to be determined is whether the State has the authority to pro-

hibit strikes which would cause an interruption or curtailment of essential public utility services.

New Jersey is convinced that no one can reasonably maintain that a requirement that an individual contract of employment contain an implied condition that there be no strike, lockout or work stoppage would in any wise obstruct, hamper or interfere with interstate commerce. Also all of such individual contracts of employment would appear to be purely intrastate transactions notwithstanding such individual contracts were negotiated through a national union as bargaining agent. Because, however, of the holding by this Court that certain relationships, which would appear at first blush to be wholly intrastate, are subject to federal legislation because of an indirect effect upon interstate commerce, the question of the applicability of federal legislation is brought in question.

The New Jersey Supreme Court in *Van Riper v. Traffic Tel. Workers Federation*, *supra*, pointed out at page 347 that this Court had in two recent cases reaffirmed the protection which the Federal Constitution affords to state statutes designed to protect the legitimate interests of the State in industrial disputes, citing *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1949) and *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525 (1949). That Court also called attention to *International Union U. A. W., A. F. L. v. Wisconsin Employment Relations Board*, 336 U. S. 245, 259, wherein it was said:

“The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a ‘fundamental right’ and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the Labor Relations Act. *National Labor Relations Bd. v. Jones & L.*

Steel Corp., 301 U. S. 1, 33, 81 L. Ed. 893, 909, 57 S. Ct. 615, 108 A. L. R. 1352."

It was the conclusion of the New Jersey Court that the interests protected by the legislation there under review are far more vital to the welfare of the public than those which were dealt with by this Court in the three cases cited.

This Court in the *International Union* case said (p. 353) that the intention to exclude the States from exercising their police power must be clearly manifested. Not only is there no clear manifestation in the instant case but on the contrary, to sustain the contention that Congress by the enactment of the Labor Management Relations Act intended to preempt the field with respect to strikes in public utilities, one must first find that, not only did the Federal Government fail to provide relief to States and their subdivisions in case of a breakdown in essential utility services, because of labor disputes, but, further, that the Federal Government deliberately contrived to deprive the States of the power to help themselves in a matter so vital to the health, welfare and safety of the people. To state the proposition is to answer it. It is unthinkable that Congress could ever have had any such intention. Congress provided for emergencies at the national level only and failed to provide for statewide and local emergencies because it considered the States better equipped to deal with such local emergencies.

New Jersey believes that, since the legislation in question is primarily concerned with the assertion of authority by a State under its police power to assure its people a continuance of service, the right to prohibit strikes in order to attain that lawful end cannot involve any conflict with federal legislation.

The New Jersey Supreme Court dealt at length with the contention that this type of legislation is invalid be-

cause it invades a field preempted by the Federal Government in the *Van Riper* case (p. 351), saying:

"The defendant union contends that the legislation is invalid in that it invades a field which has been pre-empted by the federal government through the enactment of the National Labor Relations Act and the Labor Management Relations Act. Here the basic rule is that the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested.' *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 (1942). The contention in the present case would seem to be disposed of by the decision hereinbefore referred to of the United States Supreme Court in *International Union U.A.W., A.F. of L. v. Wisconsin Employment Relations Board*, decided February 28, 1949, 93 L. Ed. (ad. ops.) 510, 518-519, where, in speaking of the effect of the National Labor Relations Act and of the Labor Management Relations Act upon the power of the states to legislate, the court said:

"This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice BRANDEIS that 'Neither the common law, nor the Fourteenth Amendment confers the absolute right to strike.' *Dorchy v. Kansas*, 272 U. S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. *Duplex Co. v. Deering*, 254 U. S. 443, 488. This court has adhered to that view. *Thornhill v. Alabama*, 310 U. S. 88, 103. The right to strike because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' and which, as the Court has pointed out, was recog-

nized as such in its decisions long before it was given protection by the Labor Relations Act. *Labor Board v. Jones & Laughlin*, 301 U. S. 1, 33.

'As to the right to strike, however, this Court, quoting the language of sec. 13, has said, 306 U. S. 240, 256, "but this recognition of 'the right to strike' plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work," and it did not operate to legalize the sit-down strike, which state law made illegal and state authorities punished. *Labor Board v. Fansteel Corp.*, 306 U. S. 240. Nor, for example did it make legal a strike that run afoul of federal law, *Southern S.S. Co. v. Labor Board*, 316 U. S. 31; nor one in violation of a contract made pursuant thereto, *Labor Board v. Sands Mfg. Co.*, 306 U. S. 332; nor one creating a national emergency, *United States v. United Mine Workers*, 330 U. S. 258.'

Thus the power still resides in the states in a proper case to prohibit strikes notwithstanding the existing federal legislation."

Subsequent to the determination in the *Van Riper* case, the matter was again before the New Jersey Courts, the contention being made that *International Union U.A.W. & A. V. O'Brien*, decided May 8, 1950, 94 L. Ed. (ad. ops.) 659, 339 U. S. 454, is authority for the contention that a State may not enact such legislation. The New Jersey Supreme Court in disposing of this contention in *New Jersey Bell Telephone Co. v. Communication Workers*, 5 N. J. 354, 366 (Sup. Ct., 1950), said:

"Our analysis of the *O'Brien* case, *supra*, does not lead us to the same conclusion. In that case the constitutionality of the strike vote provision of the Michigan labor mediation law was questioned. The Union had struck against a private industrial organization, engaged in interstate commerce, without conforming to the prescribed state procedure; the state procedure differed from that provided in the

federal legislation and the court decided that because of the conflict the state statute was unconstitutional. The court said that the regulation of the right to peacefully strike for higher wages had been pre-empted by Congress, but the case being decided by the court involved a statute regulating the right to strike against private industry. It was not a statute such as the New Jersey statute, in which a state, in the exercise of its sovereignty, seeks to maintain without interruption the supply of services, considered essential to the welfare and health of its people, being furnished by a public utility, operating under a franchise by the state, whose services furnished are primarily intrastate. It is significant that in the *O'Brien* case, *supra*, the court said, 'Even if some state legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the Federal Act.' Our examination of the Federal Act discloses no provision therein which prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude states from exerting their police power must be clearly manifested,' *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. Ed.

1154 (1942), we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been pre-empted by Congress, and that the *O'Brien* case, *supra*, is inapplicable to the present situation.

"We reiterate the statement made in the *Van Riper* case, *supra*, that 'Thus the power still resides in the states in a proper case to prohibit strikes notwithstanding the existing federal legislation.' We consider this a 'proper case' within the foregoing statement and find nothing in the *O'Brien* case, *supra*, of a dissuasive nature."

In *Parker v. Brown*, 317 U.S. 341, 360 (1942), this Court pointed out that it has been repeatedly held that the grant of power by the commerce clause did not wholly withdraw from the states the authority to regulate the commerce in matters of purely local concern.

In *N. L. R. B. v. Jones & Laughlin Steel Corporation*, *supra*, this Court said (p. 30):

"The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction which the commerce clause itself establishes between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system."

In *California v. Thompson*, 313 U. S. 109, 113 (1940) this Court recognized

"that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which, because of their local character and their number and diversity may never be adequately dealt with by Congress."

In *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 499 (1949) this Court repeatedly emphasized that "it was

the province of the state 'to set the limits of permissible contest open to industrial combatant,' " saying

"Further emphasizing the power of a state 'to set the limits of permissible contest open to industrial combatants' the Court cited with approval the opinion of Mr. Justice BRANDEIS in *Duplex Printing Co. v. Deering*, 254 U. S. 443, at page 488, 41 S. Ct. 172, at page 184, 65 L. Ed. 349, 16 A. L. R. 196. On that page the opinion stated:

'The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.' "

These rules would be meaningless if a State may not protect itself under the facts of the instant case.

The State again emphasizes that we are here concerned not with the usual dispute between employer and employee but rather with the effect upon an outsider, the public, of such dispute. It is significant that in the *O'Brien* case this Court pointed out that the Union involved was the bargaining agent in plants in California, Indiana and Michigan. The Court was obviously impressed with the interstate aspect of the Union activities in the case. And in the light of some clearly demonstrated public need, which would justify the exercise of the police power, there can be no complaint against the determination made in that case since the Court in the *O'Brien* case was dealing with a statute having for its primary concern the control of labor relations. As the State will show hereafter, the *O'Brien* case and *LaCrosse Telephone Corp. v. Wisconsin*

Labor Relations Board, 336 U. S. 18 (1949), can be distinguished by the fact that (1) the public need was not demonstrated in those cases and (2) the Court was primarily concerned with Union activities and not with the individual contracts of employment. Congress can freely legislate concerning such Union activities without in anywise encroaching upon the power of a State to guaranty to its people a continuance of essential utility service. In this connection, the State also points out that in their brief, the Petitioners have repeatedly emphasized the right of "traditional peaceful strike". The State respectfully submits that there can be no peaceful strike against the welfare of the people.

The State of New Jersey respectfully submits that a State has the authority to limit strikes in public utilities furnishing essential services whenever any such strike would result in an interruption or curtailment of such essential services.

POINT III

As an incident to the regulation of public utilities to assure a continuance of service, a State is authorized to provide for compulsory arbitration of labor disputes involving the contract rights of individual employees in cases where the employers and employees in such utilities have been denied the right of strike and lockout.

It having been determined that a State does have the authority under its police power to make regulations designed to prevent a work stoppage in public utilities furnishing essential services and that as an incident of such authority the State may limit the right to strike, it now becomes necessary to determine whether the State may compel the parties to the labor dispute to submit to compulsory arbitration. The State respectfully submits that

for the first time the question of the invasion of a field preempted by federal legislation comes into the case. As was suggested above, it is conceivable that having determined both other questions in favor of the State, this Court could deny the power in the State to compel compulsory arbitration. The State earnestly submits that this Court should not so find because as a necessary part of State regulatory legislation, the State should be permitted to provide a forum where the wages, hours of employment, and the working conditions of the individual employees may be fixed in case of dispute. The State will deal with Union activities under the next point.

The State believes that it has been demonstrated that there is no authority which denies to a State the power to assure to its people a continuance of essential utility services. But can an adequate result be accomplished while at the same time having all labor disputes determined by collective bargaining under the Federal Act? New Jersey respectfully suggests that it could not.

It has been said that, when the subject lies within the police power of the State, "debatable questions as to reasonableness are not for the Courts but for the legislature, which is entitled to form its own judgment," *Sproles v. Binford*, 286 U. S. 374 (1932); and that the range of the State's discretion in promoting the security and well-being of the public "accords with the subject of its exercise," *Stirling v. Constantin*, 287 U. S. 378 (1932); and that where the end is one to which legislative power may properly be directed, it is enough "if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end," *Stephenson v. Binford*, 287 U. S. 251 (1932). Let us examine the instant situation in the light of such rules.

Let us suppose that this Court had held that a State was authorized to prohibit strikes and lockouts in public utility plants and that thereafter a labor dispute arose.

If that dispute concerned an increase in wages, the Company with its employees unable to strike could wilfully stall negotiations. If the dispute concerned a decrease in wages, the employees with the Company unable to engage in a lockout, could wilfully stall the negotiations. Nor need it necessarily be wilful. The respective parties, sincerely believing in the merits of their own positions, could refuse to budge. We need only to examine the facts of known cases to realize the difficulty. The only real protection which the parties would have, in the event that the State can prevent a strike or lockout, is some procedure similar to that which has been set up by the several state statutes. The provisions of the Federal legislation would be manifestly insufficient.

It should be pointed out that, under the New Jersey statute, it is provided that sixty days notice must be given of the intention to engage in a strike, work stoppage or lockout. N. J. S. A. 34:13B-18; App. page viii. The statute provides that during the sixty day period, it shall be the duty of the parties to endeavor to reach an agreement by collective bargaining.

There is nothing in the statute which prevents the two parties from availing themselves of the facilities of the National Labor Relations Board during this cooling off period. Only if there is a final breakdown of negotiations and only if the Governor finds that a strike, work stoppage or lockout will result in failure to continue the operations of a public utility and threatens the public interest, health and welfare do the seizure and compulsory arbitration provisions of the law come into operation. N. J. S. A. 34:13B-13 *et seq.*; App. page v. It must be obvious that New Jersey by the enactment of compulsory arbitration provisions as an incident to a plan to assure a continuance of essential utility services was not in anywise concerned with the regulation of interstate commerce.

And so with the other States. Those several States by the adoption of statutes similar to the statute under consideration do not pretend to regulate interstate commerce in any respect. It may not reasonably be said that the said statutes do constitute an interference with such commerce. In fact it can be fairly said that the statutes do not seek to interfere in any respect with service furnished in either interstate or intrastate commerce. The sole purpose behind the enactment of the statutes was to assure to the people of the several States that the regular everyday supply of essential utility services would be maintained. If, incidentally, some interstate service which would otherwise be discontinued is likewise maintained, can that by any stretch of the imagination be said to be an interference with interstate commerce? The Petitioners state at page 7 of brief in No. 329 that any interruption of business by a labor dispute would affect interstate commerce. They reason that this gives the federal authorities jurisdiction and deprives the State of the power to prevent just such interruption. They reason that an instrument designed to protect the public may now be used to destroy that public. This Court easily disposed of such illogical argument in *Lincoln Federal Labor Union v. Northwestern Iron and Metal Company*, *supra* (p. 537).

a) Concerning the Applicability of the Commerce Clause.

In *Parker v. Brown*, *supra*, this Court said that the principal object sought to be accomplished by the Commerce Clause was the prevention of the impairment to or obstruction of the free flow of commerce. There is no such interference, impairment or obstruction in the instant case. In *Denver & R. G. R. R. Co. v. Denver*, 250 U. S. 241, 246 (1918), the Court said:

“The objection that the ordinance offends against the commerce clause of the Constitution is not tenable. The ordinance makes no discrimination

against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly."

In *South Covington Ry. Co. v. Covington*, 235 U. S. 537, 546 (1914), the Court said:

"In the light of these cases, and upon principle, the conclusion is reached that it is competent for the State to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce. Summing up the matter, it is there stated (p. 402):

"Our system of government is a practical adjustment by which the National Authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.' "

In *Erie R. R. Co. v. Public Utility Comm.*, 254 U. S. 394, 410 (1921), there is shown the extent to which this Court will go to protect the State in its power to guard the safety of its people in a case where Congress has not acted specifically to deprive the State of such power, notwithstanding

a claimed interference with interstate commerce. See also *California v. Thompson*, 313 U. S. 109, 115.

In *Terminal Association v. Trainmen*, 318 U. S. 1, 8 (1943), it was said:

"If lack of facilities at the state line requires as a practical matter that in order to provide cabooses in Illinois appellant must also provide them for some distance in Missouri, that fact does not preclude Illinois from regulating the operation to the limits of its territory. *Missouri Pac. R. Co. v. State of Kansas*, 216 U. S. 262, 30 S. Ct. 330, 54 L. Ed. 472; cf. *South Covington & C. St. Ry. Co. v. City of Covington*, 235 U. S. 537, 35 S. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792."

It is interesting to note that the Court cited the *South Covington Railroad Company* case as its authority.

The effect of such decisions have not been altered by *Southern Pacific v. Arizona*, 325 U. S. 761 (1945) wherein the Court held that, notwithstanding that Congress has not acted on the subject, the commerce clause does give protection from State legislation inimical to the national commerce and that the United States Supreme Court is the arbiter of the competing demands of the State and National interests. That case simply holds that the needs of the State must be real and must not unduly oppress interstate commerce. New Jersey respectfully urges that it may not reasonably be said that the State has interfered with or restricted interstate commerce in any manner in the instant case nor that the State has done anything not necessary to effectuate the lawful aims of the State on behalf of its people.

In *Parker v. Brown*, *supra*, 317 U. S. 341, 361, this Court said in sustaining a local regulation concerning food against the claim that such regulation was in conflict with the commerce clause and with the Agricultural Marketing Agreement Act:

“And such regulations of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. * * * *Sligh v. Kirkwood*, 237 U. S. 52; * * *.”

And again at page 367:

“The effect on the commerce is not greater, and in some instances was far less, than that which this Court has held not to afford a basis for denying to the states the right to pursue a legitimate state end. * * * *Sligh v. Kirkwood*, *supra*.”

Unless it may be clearly shown that the Congress intended to withdraw from the States the power to regulate the terms of employment of persons engaged in furnishing an intrastate service declared by the Legislature to be a “life essential”, even though such regulation be necessary to assure a continuance of such service, it must be held that the power does exist in the State to regulate such employment regardless of the fact that some portion of the business of the Company is interstate.

To accomplish a lawful purpose, the State has made a regulation which provides that any person wishing to work in an essential public utility service must to a limited extent forego his right to bargain in a certain way. In place of his prior right, a method is provided whereby his contract problems can be determined by resorting to a statutory procedure at law instead of “the primitive method of trial by combat.” In this connection, it must be remembered that such public utility employees hold very favored positions. They are employed by a monopoly which is regulated by law but which by the same law is assured a fair return upon investment after all wages have been paid. Protected by contracts that has been consummated because of liberal labor laws, they have attained certain tenure and pension rights. Theirs not the worry of the ordinary industrial worker.

The public utility employees have chosen such calling voluntarily because of the benefits it affords. The States now ask that as a condition of such employment, the public be assured that there be no cessation in the furnishing of the services provided by their employer under state franchise by reason of any dispute concerning wages, hours or conditions of employment of the individual employees.

The State respectfully submits that no violence will be done to our concept of the proper working of our federal scheme of government if it should be held that, notwithstanding that the National Labor Relations Board may ordinarily have jurisdiction to determine labor disputes involving employees of public utilities furnishing essential intrastate services under State franchises, the States do have concurrent jurisdiction to the extent needed to assure the satisfactory working of regulations designed to protect the public from the dangers which would accompany an interruption or curtailment of the supply of such services. The State respectfully urges that, since the Federal Government has not provided satisfactory relief for the people of the several States in the event of a cessation in the supply of such services, the States are authorized to make necessary regulations and that as an incident to the right to prohibit strikes, which would cause an interference with the supply of services, may provide for compulsory arbitration of certain labor disputes.

POINT IV

Concerning the Activities of the Unions

The State has made a distinction between compulsory arbitration of disputes directly affecting the individual employee such as hours, wages and the conditions surrounding the work of those employees and disputes affecting a Union as a separate entity, such as a demand for a union

shop. The New Jersey Supreme Court said in *New Jersey Bell Telephone Co. v. Communication Workers*, *supra* (p. 369), that the New Jersey statute properly construed did not give a board of arbitration jurisdiction to award union security. This construction by New Jersey's highest court is conclusive on such point. *Kovacs v. Cooper*, 336 U. S. 77 (1949). The New Jersey Court said that any such jurisdiction would have been in conflict with the letter and spirit of the Federal Act which premises the question of union security upon collective bargaining and not compulsion.

There was nothing inconsistent in such holding. The individual employees actually carry on the work necessary to maintain the flow of essential utility services. Not so the Union. It is not employed by the public utility company. Any suggestion to the contrary would bring down the wrath of the National Labor Relations Board as in *National Labor Relations Board v. Baltimore Transit Co.*, *supra*. Therefore while it is highly essential that a ready means be provided for the settlement of labor disputes concerning the wages, hours and conditions of employment of the individuals who perform the work, there is not present the same necessity with respect to the bargaining agent, who represents the employees and has no connection with the company.

This Court has repeatedly recognized that the Union and its members are not one and the same thing. *Steele v. L. & N. R. R. Co.*, 323 U. S. 198 (1944); *Tunstall v. Brotherhood*, 323 U. S. 192 (1944); *United States v. White*, 322 U. S. 694 (1944); *American Communications Ass'n v. Douds*, 70 S. Ct. 674, decided May 8th, 1950.

Nor is there any inconsistency in having the necessary employee disputes resolved in a statutory state tribunal in lieu of a right to strike while leaving matters of union security to the operation of the federal legislation. This

is far short of the situation presented by *Lincoln Federal Labor Union v. Northwestern Iron and Metal Company*, 335 U. S. 525 (1948) and *American Federation of Labor v. American Sash & Door Co.*, 335 U. S. 538 (1948) wherein a North Carolina statute and constitutional amendments of Nebraska and Arizona, which in effect prohibit or restrict closed shop contracts, were upheld.

The State has called attention to this distinction because it does much to explain and distinguish *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board*, 336 U. S. 18 (1949) and *International Union of U. A. A. & A. v. O'Brien*, 339 U. S. 454 (1950). In the former case the question at issue was the power of the State to provide a tribunal for determining which union was to be the bargaining agent—a matter with which the consumer public could not be particularly concerned. In the *O'Brien* case it was pointed out that the Union in question was the bargaining agent in California, Indiana and Michigan. The activities of the Union itself were interstate in character. In the absence of any compelling local need it was natural that the interstate nature of the Union activities should be uppermost in the thoughts of the Court. The State respectfully submits that these two cases cannot be controlling in the instant case because (1) we are not here concerned with the determination of a usual labor dispute between an employer and its employees but with a dispute which if left unregulated may cause incalculable harm to the people as a whole and (2) because no federal law has been enacted which seeks to guard the people against such harm.

The construction placed upon the New Jersey statutes by the Supreme Court of New Jersey is just one more indication that no violence will be done to our Federal scheme of government by permitting the National Labor Relations Act and the Labor Management Relations Act on

the one hand and the State regulatory acts on the other to stand together. The Federal and State laws can be read together to give the public the maximum desired relief. It is respectfully submitted that this conclusion of the State is in keeping with the reasoning of Mr. Justice FRANKFURTER who said in *Palmer v. Massachusetts*, 308 U. S. 79, 83 (1939):

“Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.”

Such balance cannot be struck if a State is denied the power to protect its people against the catastrophe of a crippling strike in an intrastate public utility.

CONCLUSION

The State of New Jersey respectfully suggests that the issues in the instant causes will permit this Honorable Court to hold that

(1) Notwithstanding that the National Labor Relations Board may have jurisdiction to determine certain labor disputes in public utilities furnishing essential intrastate services, a State may make reasonable regulations under its police power designed to assure to its people a continuance of the supply of such essential intrastate services and calculated to avoid the dangers that would be attendant upon a stoppage of such services.

(2) As a necessary incident to the power to make such regulations, a State may prohibit any strike in a public utility furnishing such essential intrastate services, where such strike will cause an interruption in or curtailment of such services or threatens to cause such interruption or curtailment of services.

(3) Where a State prohibits strikes and lockouts in public utilities furnishing essential intrastate services in order to assure a continuance in the supply of such services, the State is authorized to provide for compulsory arbitration of a labor dispute, which caused the threat of a strike or lockout, until such time as adequate relief is afforded at the Federal level.

Respectfully submitted,

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APPENDIX

New Jersey Statutes Annotated (Chapter 13B. Labor Disputes in Public Utilities)

34:13B-1. DECLARATION OF POLICY

It is hereby declared to be the policy of the State that heat, light, power, sanitation, transportation, communication and water are life essentials of the people; that the possibility of labor strife in utilities operating under governmental franchise is a threat to the welfare and health of the people; that utilities operating under such franchise are clothed with public interest, and the State's regulation of the labor relations affecting such public utilities is necessary in the public interest.

It is further declared to be the policy of this State that after the taking of possession of any public utility by the State pursuant to the provisions of section thirteen hereof,¹ such public utility shall become for purposes of production and operation a State facility and the use and operation thereof by the State in the public interest shall be considered a governmental function of the State of New Jersey. L.1946, c. 38, p. 87, § 1, as amended L.1947, . 75, p. 447, § 3.

. . .

34:13B-2. COLLECTIVE BARGAINING

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act.¹ No public utility, its officers or agents, shall deny or in any way question the right of its employees to join, organize or assist in organizing the labor organization of their choice, and it

shall be unlawful for any public utility to interfere in any way with the organization of its employees, or to use the funds of the public utility in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization; *provided, however*, that it shall not be unlawful to require as a condition of employment, membership in any labor organization, not initiated, created or existing as a result of practices declared unlawful hereby; *provided*, that nothing in this act shall be construed to prohibit a public utility from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a public utility from furnishing free transportation to its employees while engaged in the business of a labor organization. In the event of a controversy as to who are the representatives of any given craft or class of employees of a utility for the purpose of collective bargaining or of a controversy as to which employees of a utility constitute or are members of a given class and entitled to vote in an election for the choice of representatives for purposes of collective bargaining, the State Board of Mediation shall determine such question or questions and certify its findings to the employees and to the utility. Such finding of the State Board of Mediation shall be conclusive. L.1946, c. 38, p. 87, § 2.

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34:13B-3. ADDITIONAL POWERS TO STATE BOARD OF MEDIATION

There is hereby included in the functions of the State Board of Mediation the following responsibility:

(A) The determination of who are the representatives of any given craft or class of employees of a utility; which

employees of a utility constitute or are members of a given craft or class and entitled to vote in an election for choice of representatives of such craft or class for purposes of collective bargaining. It shall be the duty of the State Board of Mediation to recognize as an appropriate bargaining unit, any craft, group, or class of employees of a utility, the majority of whom desire to be represented as such class, craft or group. L.1946, c. 38, p. 88, § 3.

34:13B-4. CONTRACTS BETWEEN A UTILITY AND ITS EMPLOYEES

All labor agreements hereafter entered into between the management of a utility and its employees or any craft or class of employees shall be reduced to writing and continue for a period of not less than one year from the date of the expiration of the previous agreement entered into between the management of the utility and its employees or if there has been no such previous agreement then for a period of not less than one year from the date of the actual execution of the agreement. Such agreement shall be presumed to continue in force and effect from year to year after the date fixed for its original termination unless either or both parties thereto inform the other, in writing, of the specific changes desired to be made therein and shall also file a copy of such demands with the State Board of Mediation, at least sixty days before the original termination date or sixty days before the end of any yearly renewal period. L.1946, c. 38, p. 89, § 4.

34:13B-5. WRITTEN NOTICE OF CHANGES DESIRED IN EXISTING LABOR CONTRACTS REQUIRED

In the case of all existing labor contracts, agreements or understandings which do not provide for at least a sixty-day notice of desired changes and which contracts, agreements or understandings terminate after seventy days following the effective date of this act, the parties thereto shall nevertheless inform, in writing, the other party or

parties of any specific changes desired to be made in said contract, agreement or understanding and file a copy of such desired changes with the State Board of Mediation at least sixty days before the date fixed for the termination of said contract, agreement or understanding. In the case of labor contracts, agreements or understandings terminating within seventy days after this act shall become effective, the parties thereto shall forthwith, or not later than ten days after the effective date of this act, inform the other party, in writing, of the specific changes desired to be made in said contract, agreement or understanding and promptly file a copy of such demands with the State Board of Mediation. L.1946, c. 38, p. 89, § 5.

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34:13B-6. EXPIRED LABOR CONTRACTS; WRITTEN NOTICE OF DESIRED CHANGES REQUIRED

Whenever at the time of the passage of this act a labor contract between a utility and its employees has existed and has expired, and where services are still being performed by the said employees under the terms of said expired contract, the said employees, through their duly elected representatives, if they desire to enter into a contract with the utility or if they desire to seek changes in the terms of wages, hours or working conditions, or if the utility shall desire in any way to effect the terms of wages, working conditions, et cetera, under which employment is now being carried on then and in that case the party desiring such changes shall within ten days after the effective date of this act inform the other party in writing of the specific changes desired to be made in said terms of employment either by contract, in writing, or otherwise, and shall promptly file a copy of such demands with the State Board of Mediation. L.1946, c. 38, p. 90, § 6.

34:13B-7. CHANGE IN TERMS OF EMPLOYMENT NOT THE SUBJECT OF CONTRACT; NOTICE OF CHANGES DESIRED

Whenever, after the passage of this act,¹ a situation exists in any utility whereby employees are rendering services under terms and conditions which were not at the time of the passage of this act and which have not heretofore been the subject of the contract, and said employees desire to effectuate a change in the terms of employment or a utility desires to effectuate a change in said terms of employment then and in that event, it shall be the duty of the party desiring such change, not less than sixty days prior to the desired effective date thereof, to inform the other party in writing of the specific changes so desired in the manner in which they are desired, either by written contract or otherwise and to file a copy of such terms with the State Board of Mediation. L.1945, c. 38, p. 90, § 7.

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34:13B-13. SEIZURE

Should either party in a labor dispute between a utility and its employees, after having given sixty days' notice thereof, or failing to give such notice, engage in any strike, work stoppage or lockout which, in the opinion of the Governor, will result in the failure to continue the operation of the public utility, and threatens the public interest, health and welfare, or in the event that neither side has given notice to the other of an intention to seek a change in working conditions, and there occurs a lockout, strike or work stoppage, which, in the opinion of the Governor threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, then and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the State of New Jersey in the public interest. Such power and authority may be exercised by the Governor through such department or agency of the government as

he may designate and may be exercised after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute, a threatened or actual strike, a lockout or other labor disturbance, and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility; *provided*, that whenever such public utility, its plant, equipment or facility has been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute. L.1946, c. 38, p. 93, § 13, as amended L.1950, c. 14, p. —, § 1.

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34:13B-14. GENERAL

The Governor is authorized to prescribe the necessary rules and regulations to carry out the provisions of this act.¹ L.1946, c. 38, p. 94, § 14.

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34:13B-15. LABOR NOT TO BE REQUIRED WITHOUT EMPLOYEE'S CONSENT

Under no circumstances shall any employee be required to render, perform or engage in any work, labor or service without his consent; nor shall anything in this act,² or in any amendment thereof or supplement thereto, be construed to make the quitting of his work, labor or services by an individual employee an illegal or prohibited act; nor shall any court issue any process to compel the performance by an individual employee of such work, labor or service without his consent. L.1946, c. 38, p. 94, § 15, as amended L.1947, c. 75, p. 451, § 9.

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34:13B-16. DEFINITIONS

(a) The term "public utility" shall include autobusses; bridge companies; canal companies; electric light, heat and power companies; ferries and steamboats; gas companies; pipeline companies, railroads; sewer companies; steam and water power companies; street railways; telegraph and telephone companies; tunnel companies; water companies.

(b) The term "person" means any individual, firm, co-partnership, corporation, company, association, or joint stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

(c) The term "representative" means any person or persons, labor union, organization, or corporation designated either by a utility or group of utilities or by its or their employees to act or do for them.

(d) The term "collective bargaining" shall be understood to embody the philosophy of bargaining by employees through representatives of their own choosing, and shall include the right of representatives of employees' units to be consulted and to bargain upon the exceptional as well as the routine wages, hours, rules, and working conditions.

(e) The term "labor dispute" shall involve any controversy between employer and employees as to hours, wages, and working conditions. The fact that employees have amicable relations with their employers shall not preclude the existence of a dispute among them concerning their representative for collective bargaining purposes.

(f) The term "employee" shall refer to anyone in the service of another, actually engaged in or connected with the operation of any public utility throughout the State. L.1946, c. 38, p. 94, § 16.

34:13B-17. SEVERABILITY

If any clause, sentence, paragraph or part of this act,¹ or of any supplement thereto or amendment thereof, or the application thereof to any person or circumstances, shall for any reason be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, or such supplement thereto or amendment thereof, and the application of such provision to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this act and such supplement thereto and amendment thereof would have been adopted had such invalid provision not been included therein. L.1946, c. 38, p. 95, § 17, as amended L.1947, c. 75, p. 451, § 10.

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34:13B-18. SIXTY-DAY NOTICE OF INTENTION TO STRIKE

It shall be unlawful for any employee or representative of any craft, class or group of employees of a public utility to institute, participate in or aid in the conduct of a strike or work stoppage or for a public utility or any officer, agent or representative thereof to institute, participate in or aid in any lockout until sixty days shall have elapsed after written notice of intention to institute, participate or aid in the conduct of a strike or work stoppage or lockout has been served by the employee or representative intending to institute, participate in or aid in a strike or work stoppage or the public utility intending to institute, participate in or aid in a lockout upon the State Board of Mediation and the other party to the dispute. Said notice may be served on or after but not before the termination of the collective bargaining agreement between the parties and in cases where no such collective bargaining agreement exists, may be served at or after but not before the expiration of

the notice of desired changes required to be served under the provisions of the act which this act supplements.¹ During the aforementioned sixty-day period it shall be the duty of all parties to continue their endeavors in good faith to reach an agreement and said sixty-day period may be extended by written agreement of the parties, filed with the State Board of Mediation. L.1947, c. 47, p. 160, § 2.

* * *

34:13B-19. STRIKE AFTER SEIZURE

After the Governor has taken or shall take possession of any plant, equipment or facility of any public utility for the use and operation by the State of New Jersey in the public interest, pursuant to the provisions of section thirteen of the act which this act supplements,¹ and during the continuance of such possession, the relationship between the Government of the State of New Jersey and the persons employed at such public utility, except those who elect to quit such employment, shall be that of employer and employee; and during the continuance of such possession it shall be unlawful for any person employed at such plant or facility to participate in or aid in any strike, concerted work stoppage or concerted refusal to work for the State as a means of enforcing demands of employees against the State or for any other purpose contrary to the provisions of this act.² L.1947, c. 47, p. 161, § 3, as amended L.1947, c. 75, p. 447, § 4.

1. Section 34:13B-13

2. Sections 34:13B-18 to 34:13B-25

* * *

34:13B-20. BOARD OF ARBITRATION; SUBMISSION TO BOARD

Within ten days after the Governor has taken or shall take possession of any plant, equipment or facility of any public utility pursuant to the provisions of section thirteen of the act which this act supplements,¹ or within ten days after the effective date of this act, whichever is later, any and all disputes then existing between the public utility

and the employees shall be submitted to a Board of Arbitration to be constituted within such ten-day period as follows: the management of such public utility and the representatives of such employees shall each designate in writing one person to serve as a member of such Board of Arbitration and file such designation with the State Board of Mediation; the two persons so designated shall choose three disinterested and impartial persons and shall file such designations with the State Board of Mediation, and the five thus appointed shall compose, and act as the Board of Arbitration. Such board shall elect one of its members to serve as chairman thereof. In the event that the persons designated by the management and the representatives of the employees shall, within such ten-day period, fail to choose the three disinterested and impartial persons hereinabove referred to, and file the designations of such persons with the State Board of Mediation, then the Governor shall, upon being notified to that effect by the State Board of Mediation, forthwith appoint such three disinterested and impartial persons to serve as members of such Board of Arbitration and shall designate one of the members of such board to serve as chairman thereof.

In the event that either the management of the public utility involved or the representatives of the craft, class or group of employees shall fail or neglect to designate, as hereinabove provided, persons to represent them respectively upon such Board of Arbitration, within such ten-day period, then the Governor shall, upon being notified thereof by the State Board of Mediation, forthwith appoint five disinterested and impartial persons to constitute such Board of Arbitration and shall designate one of the members of such board to serve as chairman thereof. All appointments hereinabove required to be made shall be filed with the State Board of Mediation. L.1947, c. 47, p. 161, § 4, as amended L.1947, c. 75, p. 447, § 5.

34:13B-21. ⁶ HEARING; POWERS OF BOARD; REFUSAL TO TESTIFY OR PRODUCE EVIDENCE

The Board of Arbitration shall promptly proceed to arbitrate the matters submitted to it. It shall promptly hold hearings and shall have the power to administer oaths and compel by subpoena the attendance of witnesses and the furnishing and production by any person of such information, books, records, papers and documents as may be necessary to a determination of the issue or issues in dispute. If a person subpoenaed to attend any hearing refuses or fails to appear or to be examined, or to answer any question or to produce any books, records, papers and documents when ordered so to do by the Board of Arbitration, such board may apply to the Supreme Court or any justice thereof, who shall have the power of the court for that purpose, to make an order returnable in not less than two nor more than five days, directing such person to show cause before the court or a justice thereof why he should not comply with the subpoena or direction or order of such board, and upon return of such order the court or justice shall examine such person, under oath, and thereupon make such order as may be required and any refusal or failure to obey such order of the court or the justice may be punished by said court or by said justice as a contempt of the Supreme Court. Both parties to the dispute shall be afforded an opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the Board of Arbitration shall deem relevant to the issue or issues in controversy. L.1947, c. 47, p. 162, § 5, as amended L.1947, c. 75, p. 449, § 6.

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34:13B-23. FINDINGS AND AWARD; DURATION OF ORDER; RETROACTIVE EFFECT; APPEAL

The findings, decision and order of the Board of Arbitration shall, unless modified or reversed on appeal, be conclusive and binding upon all of the parties to the dispute and such order of such board shall be complied with by the parties in accordance with the terms thereof. The order of the Board of Arbitration shall remain in effect for a period of one year from the date thereof unless the board shall fix a lesser period therefor after having given due consideration to the duration of any prior contract between the public utility and the employees thereof, and any practice with respect to the duration of such contract existing in the same or similar industries. The Board of Arbitration may, in its discretion, with respect to any labor dispute existing at the effective date of this act, provide that any award made by it shall be retroactive to the day of the return to work by the employees or, with respect to any labor dispute occurring after the effective date of this act, to the day of the taking of possession pursuant to the provisions of section thirteen of the act which this act supplements,¹ or to the day of the return to work by the employees, or to the day of the termination of any contract between the public utility and its employees.

Within thirty days after the Board of Arbitration has filed with the Governor such findings, decision and order, any party to the dispute aggrieved thereby may secure judicial review thereof by appeal therefrom to the Supreme Court. A copy of the notice of appeal shall be served upon the chairman of the Board of Arbitration and upon the other party to the dispute or its attorney. In any such appeal the findings of the Board of Arbitration upon the facts, if supported by any evidence, shall be conclusive. The filing of such notice of appeal shall not supersede or stay the order of the Board of Arbitration unless the Supreme Court or a justice thereof shall so direct. L.1947, c. 47, p. 163, § 7, as amended L.1947, c. 75, p. 449, § 7.

¹ Section 34:13B-13

34:13B-24. LOCKOUT, STRIKE OR WORK STOPPAGE; PENALTY

Any lockout, authorized or engaged in, by any public utility in violation of any provision of this act,¹ or any failure or refusal by a public utility to abide by the terms of any decision or order made by any board of arbitration constituted in accordance with the provisions of this act, or any strike or concerted work stoppage, authorized or engaged in, or continued to be engaged in by any labor union or representative of any craft, class or group of employees of a public utility, or any concerted action on the part of a substantial number of the members of any labor union resulting in an interruption of the operation of any public utility, in violation of any provision of this act or in connection with any refusal to abide by the terms of any decision or order made by any board of arbitration constituted in accordance with the provisions of this act, shall subject such public utility and any officer or agent thereof participating or aiding therein or such labor union or representative of any craft, class or group of employees of a public utility to a penalty in the sum of ten thousand dollars (\$10,000.00) per day for each day during the period of such lockout, strike, concerted work stoppage, or failure or refusal to abide by the terms of such decision or order, such penalty to be recovered in the name of the State in an action at law in any court of competent jurisdiction. L.1947, c. 47, p. 164, § 8, as amended L.1947, c. 75, p. 450, § 8; I. 1950, c. 14, p. —, § 2.

1. Sections 34:13B-18 to 34:13B-25

34:13B-25. VIOLATIONS

Any officer or agent of any public utility or labor union, or any person performing the duties of such officer or agent, who shall willfully violate, or aid and abet the violation of any of the provisions of this act,¹ or attempt to do so, shall, for each such offense, be guilty of a misdemeanor and upon conviction thereof, shall be fined not less than twenty-five dollars (\$25.00) nor more than two hundred fifty dollars (\$250.00). Each day's continuance of the violation shall constitute a separate offense. L.1947, c. 47, p. 164, § 9, as amended L.1947, c. 75, p. 453, § 12.

1. Sections 34:13B-18 to 34:13B-25

34:13B-26. INJUNCTION; DECLARATORY OR OTHER RELIEF

Notwithstanding the provisions of any other law to the contrary:

The commissioner, director or other chief administrative officer of any department or agency of the Government of the State of New Jersey through which the power and authority of the Governor in the use and operation of the plant, equipment or facility of any public utility is exercised pursuant to the provisions of section thirteen of chapter thirty-eight of the laws of one thousand nine hundred and forty-six¹ or the Attorney-General, may file a bill in the Court of Chancery in the name of this State, on the relation of said commissioner, director or other chief administrative officer or Attorney-General, as the case may be, for an injunction to prohibit any violation of any of the provisions of this act,² or of any provision of any act which this act supplements or amends, or for any declaratory and other relief. Every such cause shall proceed in the Court of Chancery according to the rules and practice of bills filed in the name of the State of New Jersey or the Attorney-

General on the relation of individuals or departments, or for the protection of property owned or operated by the State of New Jersey; and causes of emergency shall have precedence over other litigation pending at the time in the Court of Chancery, and the final hearing may be had at such time and on such notice as the Chancellor shall direct; and the Court of Chancery shall have power and authority to grant such relief and make or render such orders and decrees as it shall determine to be equitable and just in the premises. L. 1947, c. 75, p. 452, §11, supplementing L. 1946, c. 38.

. . .

34:13B-27. WRITTEN FINDINGS AND DECISION; FACTORS TO BE CONSIDERED

(a) It shall be the duty of each board of arbitration appointed pursuant to chapter forty-seven of the laws of one thousand nine hundred and forty-seven to make written findings of fact and to promulgate a written decision and order upon the issue or issues presented in each case and on the basis of the evidence in the record; *provided, however*, that such issue or issues shall have been in dispute between the parties; *and provided further*, that the board shall not render findings of fact, decision or order upon any issue or issues which are not proper subjects for collective bargaining for the reason that they do not pertain to wages, hours or conditions of employment.

(b) Where there is no contract between the parties, or where there is a contract but the parties are negotiating a new contract or amendments to the existing contract, and issues arise which are the subject of dispute between the parties in such negotiations, the board shall make a just and reasonable determination of the dispute, and in determining such issues, base its findings of fact, decision and order upon the following factors:

- (1) The interests and welfare of the public.

(2) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceedings, and the wages, hours and conditions of employment of employees doing the same, similar or comparable work or work requiring the same, similar or comparable skills and expenditure of energy and effort, giving consideration to such factors as are peculiar to the industry involved.

(3) Comparison of wages, hours and conditions of employment as reflected in industries in general and in public utilities in particular throughout the nation and in the State of New Jersey.

(4) The security and tenure of employment with due regard for the effect of technological changes thereon as well as the effect of any unique skills and attributes developed in the industry.

(5) Such other factors not confined to the foregoing which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, arbitration or otherwise between the parties or in the industry.

(c) The board shall not be bound by the strict rules of evidence applicable in a court of law.

(d) The findings of fact, decision and order of the board shall be made within thirty days after submission of the issues in dispute or within such additional period as may be agreed upon by a majority of the members of such board. The findings of fact, decision and order of such board shall forthwith be filed by such board with the Governor, and a copy of such findings of fact, decision and order shall be submitted to each of the parties to the dispute and another copy thereof filed with the State Board of Mediation. L. 1949, c. 308, p. 995, § 1.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1950

No. 329

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, et al.,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondents.

No. 330

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, et al.,

Petitioners,

vs.

**WISCONSIN EMPLOYMENT RELATIONS BOARD,
et al.,**

Respondents.

**On Writ of Certiorari to the Supreme Court of the
State of Wisconsin**

**BRIEF OF AMERICAN FEDERATION OF LABOR,
AMICUS CURIAE**

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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1950**

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Respondents.

**On Writ of Certiorari to the Supreme Court of the
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**BRIEF OF AMERICAN FEDERATION OF LABOR,
AMICUS CURIAE**

STATEMENT

The American Federation of Labor, as representative of some eight million workers, is vitally interested in the

issues presented in these cases. One of the principal purposes for which labor organizations are formed is to promote and improve the economic welfare of workers through the process of collective bargaining. The process of collective bargaining has been developed principally through the efforts of organized labor. By this process employees seek to obtain from employers satisfactory wages and conditions of employment.

In the briefs filed by petitioners it is well demonstrated that the Wisconsin Statutes here involved (Sections 111.50-111.65) on their face and as applied in the two cases presently before this Court must be held invalid for the reasons stated in their briefs. We concur in their reasons and urge their validity without burdening this Court with a repetition of them. We should like, however, to call attention, expressly, to the views of the American Federation of Labor that real collective bargaining, as contemplated by settled public policy and the course of Federal legislation is effectively destroyed by the Wisconsin Statutes just mentioned, which prohibit strikes by employees of public utility employers when such strikes will result in an interruption of an essential service and require their employees to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a year.

The right of collective bargaining necessarily includes the right to engage in peaceful and lawful strikes and to take lawful economic action. There can be no true and realistic collective bargaining unless these two interrelated rights are protected. Such a strike is "a lawful instrument in a lawful economic struggle or competition between employer and employees."¹ Hence, the right to engage in peaceful and lawful strikes as a concomitant of collective bargaining was recognized and protected in the Wagner Act of 1935 and the Labor-Management Relations Act of

¹ *American Steel Foundries v. Tri-City Central Trade and Labor Council*, 257 U. S. 196.

1947. In referring to collective bargaining, we at all times include the necessary element of the collective bargaining process embraced in the right to resort to peaceful economic action.

Compulsory arbitration is the antithesis and complete negative of collective bargaining. The one cannot exist side by side with the other. They cannot be applied concurrently, nor, as a practical matter, can genuine collective bargaining be conducted preliminarily to final compulsory arbitration.

Federal legislation has established public policy to encourage and protect the process of collective bargaining culminating in the National Labor Relations Act of 1935,² superseded by the Labor-Management Relations Act, 1947,³ which act makes it the specific right and obligation under Federal law of employers and the properly chosen representatives of their employees, to bargain collectively in good faith. As shown in the briefs of the petitioners, this law is applicable to public utility employers and employees.

The inherent conflict between collective bargaining and compulsory arbitration has been pointed out by William Green, President of the American Federation of Labor before the Committee on Labor and Public Welfare of the United States Senate, February 18, 1947, where he said:

"Industrial peace will not be secured by the establishment of labor courts or by compulsory arbitration. Maintenance of enduring industrial peace rests upon the full acceptance of free collective bargaining.

"Compulsion can force the parties to submit to a procedure. It may temporarily force an unwilling acceptance of the results. But forced obedience generates resistance. It is therefore a source of further conflict. Obedience, exacted by compulsion, can never be a substitute for agreement.

"While the interests of labor and management on

² 49 Stat. 449, 29 U.S.C., Sec. 151, et seq.

³ Public Law 101, 80th Congress.

4

specific issues may often be divergent, these differences are overshadowed by a common interest in greater and more efficient production which alone can yield better profits and better wages and at the same time contribute to a higher standard of living of the whole community. Labor and management are not natural adversaries. The very essence of their collective bargaining relationship is agreement. Voluntary arbitration is the outgrowth of the necessity to maintain agreement. For voluntary arbitration is based on agreement; it derives its force and effectiveness from the agreement of the parties and from no other source.

“Every step of compulsory arbitration is in the direction opposite to voluntary arbitration. The two procedures are fundamentally opposed to each other. Introduction of compulsory arbitration will therefore promptly and completely destroy the voluntary arbitration machinery through which peaceful, friendly and cooperative relations have been built up by labor and management over a period of years.”⁴

The experience of the American Federation of Labor is further reflected in a statement of Boris Shishkin, Economist, who said with reference to compulsory arbitration in the *American Federationist* of February, 1947:

“It kills collective bargaining and replaces it with litigation.

“Compulsory arbitration stunts the growth of genuine collective bargaining as a means of building up agreement a set of standards and relationships between workers and their employers. The purpose of collective bargaining is agreement. Without agreement there cannot be harmony. Compulsory arbitration rejects agreement and relies on sheer obedience instead for maintaining peace. In its very nature it is degrading. Like all institutions, it would tend to be self-perpetuating. And as such, it would thrive on strife and discord. Putting a premium on litigation, it would become a paradise for lawyers and a hell for

⁴ William Green, President, American Federation of Labor, Senate Hearings, Part 2, p. 1018, February 18, 1947.

workers and employers who must produce and do the work."⁵

The basic conflict existing between collective bargaining and compulsory arbitration is likewise recognized by the representatives of industry. Illustrative of the viewpoint of the representatives of industry is the following from "Compulsory Arbitration Opposed, Department of Manufacture, Chamber of Commerce of the United States, 1947, page 8":

"Free collective bargaining would fall into disuse under any system of compulsory arbitration. Our present system of reaching voluntary labor-management agreements on terms and conditions of employment through free, voluntary collective bargaining would be virtually supplanted by imposed settlements.

"Collective bargaining may be conceived of as a 'way of life' for employees and management to follow in their daily contacts and problems, as well as in settling disputes and arriving periodically at contracts embodying the terms under which the employees will work. The terms and conditions of employment decided by this process are those mutually agreed on by the parties. They have not been imposed by an outside body. Therefore, in the long run, they are far more satisfactory to both employer and employees than a system whereby each must accept the fiat of a governmental agency or other arbitration tribunal. Each side is far more likely to abide by decisions reached by mutual agreement than to adhere willingly and in good spirit to arbitration awards which may not in fact meet with their approval."

A similar view was expressed by Ira Mosher, formerly President of the National Association of Manufacturers in a statement presented to the Senate Committee on Labor and Public Welfare, February 15, 1947, as follows:

"We know by experience that if we provide for com-

⁵ The Case Against Compulsory Arbitration, American Federationist, February 1947, by Boris Shishkin.

pulsory arbitration the incentive to bargain collectively is destroyed. One side or the other or both may decide that since the board or court will make the final decision anyway there is not much use in their bargaining in good faith. More than that, each side will be wary of making any concessions, because such concessions would then become the starting point from which the courts or board would make its decision."⁶

Clearly pointing out the existing conflict, George W. Taylor, formerly Chairman of the War Labor Board, said:

"Those favoring compulsory arbitration of public emergency disputes would scrap collective bargaining in that one area. The meeting-of-minds criterion of fairness and equity would be supplanted under a system in which a government agency decides employment terms for employees and employers alike. •

"Nor can these comments be effectively rebutted by insisting that compulsory arbitration would become operative only if the parties failed to agree. Theoretically, avoidance of compulsory arbitration might even be looked upon as an inducer of agreements which serves the same function as a strike in collective bargaining. The evidence strongly indicates, however, that the mere provision for ultimate compulsory arbitration in itself discourages the making of those offers and counter offers without which there is no negotiation. Why should the employer make any offer which the union can use not as a starting point for agreement but as a springboard for arbitration? Why should the union accept any employer offer when, in compulsory arbitration, it would not likely get less and might get more? Why shouldn't a union make and hold to a large number of so-called fringe demands? If they are dismissed in arbitration, nothing has been lost. If they are approved, much has been gained. Negotiating tactics are entirely different when compulsory arbi-

⁶ "Should the Federal Government Require Arbitration of Labor Disputes in all Basic American Industries?"; statement presented by Ira Mosher to the Senate Committee on Labor and Public Welfare, February 15, 1947; quoted in the Congressional Digest, August-September, 1947, p. 219.

tration and not a strike is the last step. The reason: Under collective bargaining a dispute can only be settled by a meeting of minds; in compulsory arbitration this criterion is supplanted."⁷

The unanimity of opposition to compulsory arbitration arising largely from experience was apparent during the President's Joint Labor-Management Conference in 1945, which adopted the statement that "Nothing in this report is intended in any way to recommend compulsory arbitration, that is, arbitration not voluntarily agreed to by the parties."⁸ This attitude is further emphasized by the fact that among all the Taft-Hartley Act witnesses, whose testimony filled ten volumes of hearings before the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor, no management or union representative urged that arbitration be made compulsory.⁹

For a fuller discussion of the economic issues involved in compulsory arbitration, the following references are cited.¹⁰

⁷ "Is Compulsory Arbitration Inevitable," George W. Taylor, reprinted in Congressional Record with foreword by Senator Paul H. Douglas of Illinois, February 10, 1949, U. S. Government Printing Office, pp. 4-5.

⁸ Statement adopted by the President's National Labor-Management Conference, November 29, 1945. Reference: The President's National Labor Management Conference, U. S. Department of Labor, 1946, p. 47.

⁹ CCH, *Labor Law Reporter* 4th Edition, Vol. 5, p. 54,060, ¶ 53,530.

¹⁰ STATEMENTS BY UNION OFFICIALS

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EXPERIENCE WITH COMPULSORY ARBITRATION IN THE U. S.

Gagliardo, Domenico. "The Kansas Industrial Court," Lawrence, Kansas. *The University of Kansas Press*, 1941, 264 pp.

Kennedy, Thomas. "The Handbag of Emergency Disputes," *Proceedings of Second Annual Meeting*, December 29-30, 1949. Industrial Relations Research Association, p. 14-27 (Analysis of New Jersey experience).

MacDonald, Lois. "Compulsory Arbitration in New Jersey," *N. Y. U. Second Annual Conference on Labor*, Appendix C, pp. 625-706.

Petitioner's brief in Number 329 points out at length the fact that Congress, by the Labor-Management Relations Act, has completely occupied the field of peaceful strikes for higher wages in industries affecting interstate commerce and has shown that, in any event, there is such conflict between the Federal statute and the Wisconsin Act that the two cannot stand side by side.

With respect to the latter, petitioner's brief emphasizes that the absolute prohibition of the right to strike in support of collective bargaining is in conflict with the entire concept of the collective bargaining process protected and nurtured by the National Labor Relations Act.

Without the right to withhold service, to engage in a strike or concerted cessation of work, when negotiations, persuasion and argument are met with a deaf ear on the part of an employer or perhaps a complete and arbitrary refusal to negotiate and bargain, collective bargaining would not be worthy of the name. The right to bargain collectively would be stripped of all substance and in its place would rise collective submission to unilaterally dictated conditions of employment. As said by Chief Justice Taft in the case of *American Steel Foundries v. Tri-City Central Trades and Labor Council*, 257 U. S. 184:

"A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to a combine for such a lawful purpose has in many years not been denied

by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital." (257 U. S., at 196).

Similarly, in Number 330 petitioner has clearly shown by the same reasoning and authorities that the compulsory arbitration provisions of the Wisconsin Act stand on no better footing than the anti-strike provisions and must likewise fall. We are in full accord with the contentions and arguments advanced by petitioners. The principles applied in the Hill case,¹¹ LaCrosse Telephone Company case,¹² and the O'Brien case,¹³ require the invalidation of the Wisconsin statute involved here.

Obviously, the system of compulsory arbitration and absolute prohibition of strikes provided in the Wisconsin statute is the very antithesis of collective bargaining and of the Federal policy to promote collective bargaining. Because of this conflict with the Federal law alone, the Wisconsin Act cannot be upheld.

CONCLUSION

On behalf of the American Federation of Labor and for the reasons advanced herein and by petitioners in their briefs, it is submitted that the Wisconsin statute is in violation of Article I, Section 8 and Article VI of the Federal Constitution and the Fourteenth Amendment. With particular reference to 111.62 and 111.63, it is further submitted

¹¹ *Hill v. Florida*, 325 U. S. 538.

¹² *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18.

¹³ *International Union of United Automobile, Aircraft and Agricultural Workers, etc., v. O'Brien*, 339 U. S. 454.

that these sections are also in violation of the Thirteenth Amendment to the Federal Constitution.

Respectfully submitted,

J. ALBERT WOLL,

JAMES A. GLENN,

HERBERT S. THATCHER,

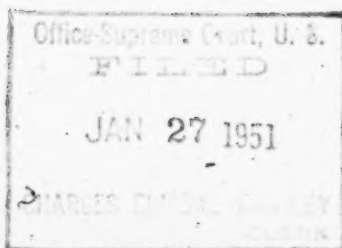
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No. 329

IN THE
Supreme Court of the United States

October Term, 1950

**AMALGAMATED ASSOCIATION OF STREET,
ELECTRIC RAILWAY AND MOTOR COACH
EMPLOYEES OF AMERICA, DIVISION 998,
GEORGE KOECHEL, CHARLES BREHM,
THOMAS MURACH, RAYMOND KNUTSON,
JACK WERY, JOE DERSINZSKI, HOWARD
LYNCH, HERMAN WEBER, PAUL BREHM,
PAUL KRAFT, STEVE MALICK, WILLIAM
BUCHE, GEORGE SLOAN, EDWIN BECKER
AND OTHMAR MISCHO,**

Petitioners,

vs.

**WISCONSIN EMPLOYMENT RELATIONS
BOARD,**

Respondent.

**ON APPEAL FROM THE SUPREME COURT
OF WISCONSIN**

**BRIEF FOR THE
COMMONWEALTH OF PENNSYLVANIA
AMICUS CURIAE**

**GEORGE L. REED, *Solicitor,*
Pennsylvania Labor Rela-
tions Board,
M. LOUISE RUTHERFORD,
Deputy Attorney General,
CHARLES J. MARGIOTTI,
Attorney General,
Attorneys for the Common-
*wealth of Pennsylvania.***

**State Capitol
Harrisburg, Pennsylvania.**

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Case Caption

1

No. 329

**IN THE SUPREME COURT OF THE
UNITED STATES**

October Term, 1950

Amalgamated Association of Street, Electric
Railway and Motor Coach Employees of
America, Division 998, George Koechel, Charles
Brehm, Thomas Murach, Raymond Knutson,
Jack Wery, Joe Dersinzski, Howard Lynch,
Herman Weber, Paul Brehm, Paul Kraft, Steve
Malick, William Buche, George Sloan, Edwin
Becker and Othmar Mischo,

Petitioners,

vs.

Wisconsin Employment Relations Board,

Respondent.

**ON APPEAL FROM THE SUPREME COURT
OF WISCONSIN.**

2
Opinion of the Court Below

**BRIEF FOR THE
COMMONWEALTH OF PENNSYLVANIA,
AMICUS CURIAE**

I. OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in 257 Wis. 43, 42 N.W. 2d 471 (1950).

II. STATEMENT AS TO JURISDICTION

The jurisdiction of this court has been invoked under Section 1257 (3) of Title 28, U.S.C.

4

Questions Presented

III. QUESTIONS PRESENTED

The only questions discussed in this brief are:

1. Whether Sections 111.50 to 111.65, subchapter III of Chapter III of the Wisconsin Statutes for 1949 are unconstitutional and void on the ground that these sections are repugnant to and in conflict with the Labor-Management Relations Act of 1947?

2. Do Sections 111.50 to 111.65 of subchapter III of Chapter III of the Wisconsin Statutes for 1949 constitute an unconstitutional encroachment upon the power of the Federal Government?

IV. STATUTES INVOLVED

The relevant provisions of the Labor-Management Relations Act of 1947 (Act of June 23, 1947), Public Law 101, 80th Congress, First Session, 29 U.S.C.A. 151 et seq., and the relevant provisions of Section 111.50 to 111.65, subchapter 111 of Chapter III of the Wisconsin Statutes for 1949 are printed in the appendix of the brief of the Respondent, Wisconsin Employment Relations Board.

V. STATEMENT OF THE CASE

The facts of the case as stated by the Court below are as follows:

This action was commenced January 4, 1949, by the Wisconsin Employment Relations Board against the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, and certain individual defendants who were officers or members of the general executive board of said association, perpetually to restrain and enjoin them from calling a strike or causing an interruption of the public passenger service of the Milwaukee Electric Railway and Transport Company in the state of Wisconsin. The pleadings consisted of the plaintiff's complaint and amended complaint, the answer of the defendants, and a reply to the answer by the plaintiff. Plaintiff moved for judgment on the pleadings, and the motion was granted. Defendants appeal from the judgment entered on April 11, 1949, of the Circuit Court of Milwaukee County, Wisconsin, granting the injunction prayed for in the amended complaint.

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Statement of the Case

On appeal, the Supreme Court of Wisconsin on May 2, 1950, issued a decision and order affirming the judgment of the Circuit Court of Milwaukee County.

On November 6, 1950, petition for writ of certiorari to the Supreme Court of Wisconsin was granted by Your Honorable Court: **Amalgamated Association of Street Electric Railway and Motor Coach Employes of America, Division 998 et al. v. Wisconsin Employment Relations Board, 71 S. Ct. 124.**

VI. INTEREST OF THE COMMONWEALTH OF PENNSYLVANIA

Pennsylvania has a statute which is very similar to Sections 111.50 to 111.65 of Subchapter III of Chapter III for 1949, which is to be found in 43 P.S., sections 213.1 to 213.16 (pocket part). The purpose of this statute, as declared in its title, is:

“To provide for the prompt, peaceful and just settlement of labor disputes between public utility employers engaged in furnishing electric, gas, water and steam heat services to the public and their employes which cause or threaten to cause strikes, lockouts, slowdowns or similar work stoppages and consequent interruptions in the supply of a public utility service on which a community served is so dependent that severe hardship would be inflicted on a substantial number of persons by a cessation of such service; providing procedures for the adjustment and settlement of such disputes; declaring that the public policy of the Commonwealth requires the continuation, without cessation

Interest of the Commonwealth of Pa.

of such public utility services; and providing means, including regulations, affecting the rights, powers and privileges of employers and employes for the enforcement of such public policy, and providing penalties."

There has been no judicial review of this statute by any court.

Without conceding that a judgment of unconstitutionality of any part of the Wisconsin statute in the instant case would likewise invalidate the Pennsylvania statute or any part thereof, nevertheless such a judgment might easily be held to have a like application to the Pennsylvania statute.

Wherefore, Pennsylvania, like Wisconsin, has a vital interest in the question whether Sections 111.50 to 111.65, Subchapter III of Chapter III of the Wisconsin Statutes for 1949 are unconstitutional and void as being repugnant to and in conflict with the Labor-Management Relations Act of 1947 and whether they constitute an unconstitutional encroachment upon the power of the Federal Government.

VII. SUMMARY OF ARGUMENT

Congress designedly left open an area for state control in enacting the Labor-Management Relations Act of 1947.

The powers still reside in states in a proper case to prohibit strikes notwithstanding the existing Federal legislation.

Approximately twelve states have enacted statutes compelling arbitration of labor disputes affecting public utilities and in three of these states, Michigan, New Jersey and Wisconsin, the constitutionality of the statutes has been sustained by the highest appellate courts as against the contention that the statutes are unconstitutional on the ground that they are repugnant to and in conflict with the Labor-Management Relations Act of 1947 or that they constitute an unconstitutional encroachment upon the power of the Federal government. In reaching this conclusion, reliance has been placed upon **International Union, etc. v. Wisconsin Employment Relations Board**, 336 U. S. 245 (1949), stating that neither common law nor the 14th amendment confers the absolute right to strike and

Summary of Argument

that dissenting views most favorable to labor in other cases have conceded the right of the state legislature to mark the limitation of tolerable industrial conflict in the public interest.

Likewise reliance is placed upon **Lincoln Federal Labor Union No. 19129 American Federation of Labor et al. v. Northwestern Iron & Smelting Co. et al.**, 335 U. S. 25 (1949) holding that the due process clause is not to be so broadly construed that the Congress and state legislation are put in a strait jacket when the attempt to suppress public and industrial conditions which they regard as offensive to the public welfare.

The Wisconsin statutes under consideration cannot be held to constitute an unconstitutional encroachment upon the power of the Federal government unless Congress has occupied the field and closed it to state regulation or very real potentials of conflict exist which will induce the allowance of supremacy to the Federal scheme even though it has not been applied in any formal way to the labor dispute under consideration. Both **International Union of United Automobile, Aircraft and Agriculture Employment Workers of America, C.I.O., et al. v. O'Brien**, 70 S. Ct. 781 (1950), and **LaCrosse Telephone Corporation**, 336 U. S. 18 (1949), are to be

Summary of Argument

distinguished on their facts from the instant case.

Under all the relevant authorities the judgment of the Supreme Court of Wisconsin should be affirmed.

VIII. ARGUMENT

There is nothing in the Labor-Management Relations Act of 1947 expressing an intent of Congress that jurisdiction over utility companies and their employes shall be exclusive, nor is there any provision to meet a community emergency. Hence the rule of federal construction applicable to the instant case is that stated by Chief Justice Hughes in **Kelly v. State of Washington**, 302 U.S. 1, 9, 10 (1937). (Boldface ours.)

“Under our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. * * * There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not

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superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot be 'reconciled or consistently stand together.' "

Approximately twelve states have enacted statutes compelling arbitration of labor disputes affecting public utilities. The constitutionality of the statutes of Michigan, New Jersey and Wisconsin have been affirmed by the highest courts of these states, as against the contention of the petitioner in the instant case that the statutes are unconstitutional on the ground that they are repugnant to and in conflict with Labor-Management Relations Act of 1947 or that they constitute an unconstitutional encroachment upon the power of the Federal Government.

See **Local 170, Transport Workers Union of America, C.I.O., et al. v. Gadola Circuit Judge, et al.**, 322 Mich. 332, 34 N.W. 2d 71 (1948) ;

State v. Traffic Telephone Workers' Federation of New Jersey, et al., 2 N.J. 335, 66 A. 2d 616 (1949) ;

United Gas, Coke & Chemical Workers of America, Local 18, C.I.O., et al. v. Wisconsin Employment Relations Board, et al., 38 N.W. 2d 692 (1949).

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In **Local 170, Transport Workers Union of America, C.I.O., et al., v. Gadola Circuit Judge, et al.**, supra, it was said by Chief Justice Bushnell of Michigan, on pages 75, 76, after citing many decisions of Your Honorable Court, that (Boldface ours):

“So considered, there is left but little room for the view that, under Federal constitutional limitations, State legislation substituting even compulsory arbitration for economic ‘trial by battle’ in the case of public utilities * * * constitutes an arbitrary and unreasonable interference with the liberty of the individuals concerned or the property rights of employer and employee.”

It was said by Mr. Justice Jackson in **International Union, etc., v. Wisconsin Employment Relations Board**, 336 U.S. 245, 252, 253 (1949) (Boldface ours):

“Congress has not seen fit in either of these Acts (the National Labor Relations Act of 1935 or the Labor-Management Relations Act of 1947) to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the

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several states traditionally have exercised control. * * * However, as to coercive tactics in labor controversies, we have said of the **National Labor Relations Act** what is equally true of the **Labor-Management Act of 1947**. That 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude states from exerting their police power must be clearly manifested.' * * * "

Likewise, in a dissenting opinion in the case last cited, it was said by Mr. Justice Douglas at page 267 (Boldface ours):

"It is the presence of a conflicting federal policy that determines whether state action must give way under the **Supremacy Clause**, even though there may be no actual or potential collision between federal and state administrative agencies. * * * "

In **State v. Traffic Telephone Workers' Federation of New Jersey**, *supra*, it was said by Chief Justice Vanderbilt of New Jersey at page 625, that (Boldface ours):

"Thus the power still resides in the States in a proper case to prohibit strikes notwithstanding the existing **Federal Legislation**."

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In reaching this conclusion, reliance was placed upon **International Union, etc., v. Wisconsin Employment Relations Board**, *supra*, where it was said by Mr. Justice Jackson at page 524, that (Boldface ours):

“ * * * This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that ‘Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.’ *Dorchy v. State of Kansas*, 272 U.S. 306, 311, 47 S. Ct. 86, 87, 71 L. Ed. 248. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488, 41 S. Ct. 172, 184, 65 L. Ed. 349, 16 A.L.R. 196. This Court has adhered to that view. *Thornhill v. State of Alabama*, 310 U.S. 88, 103, 60 S. Ct. 736, 744, 745, 84 L. Ed. 1093. * * * ”

The conclusion of Chief Justice Vanderbilt of New Jersey in **State v. Traffic Telephone Workers' Federation of New Jersey**, *supra*, that:

Argument

"The power still resides in the States in a proper case to prohibit strikes notwithstanding the existing Federal Legislation, has the support of Your Honorable Court in **Lincoln Federal Labor Union No. 19129 American Federation of Labor et al. v. Northwestern Iron & Smelting Co. et al.**, 335 U.S., 525 (1949), wherein it was said by Mr. Justice Black at page 536, that (Boldface ours):

"This Court beginning at least as early as 1934, when the *Nebbia* case (291 U.S. 502) was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See *Nebbia v. New York*, supra, 291 U.S. at pages 523, 524, 54 S. Ct. at pages 509, 510, 78 L. Ed. 940, 89 A.L.R. 1469; and *West Coast Hotel Co. v. Parrish*, supra, 300 U.S. at pages 392-395, 57 S. Ct. at pages 582, 583, 81 L. Ed. 703, 108 A.L.R. 1330, and cases cited. Under this constitutional doctrine the due process

clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

Clearly, therefore, the Wisconsin Statute under consideration cannot be held to constitute an unconstitutional encroachment upon the power of the Federal Government unless Congress has occupied the field and closed it to state regulation:

International Union of United Automobile, Aircraft and Agricultural Implementation Workers of America, C.I.O., et al. v. O'Brien, 70 S. Ct. 781 (1950).

or very real potentials of conflict exist which will induce Your Honorable Court to allow supremacy to the Federal scheme even though it has not been applied in any formal way to the labor dispute:

La Crosse Telephone Corporation, 336 U.S. 18 (1949).

In the **La Crosse Telephone Corporation** case, the Wisconsin Statute provided that the state agency could certify a collective bargaining agent for employees under a different and con-

Argument

flicting theory of representation from the policy proclaimed in the Federal Statute. It was held that to permit certification of a bargaining representative by the Wisconsin agency might be as readily disruptive of the practice under the Federal Statute as if the orders of the two boards made a head-on collision. It was said by Mr. Justice Douglas at pages 9, 10, that "These are the very real potentials of conflict which lead us to allow supremacy to the Federal scheme even though it has not yet been applied in any formal way to this particular employer".

This case is to be distinguished from the instant case for a two-fold reason: (1) No bargaining agent is selected or certified. Collective bargaining and the process of mediation and arbitration are enforced between an employer and an existing representative of employees in a unit which has either been certified by the labor board having jurisdiction or in a unit which has been agreed to by the parties. In the second place, the National Labor Relations Board has not been authorized by Congress to forbid a strike or other industrial dispute, where, as under the Wisconsin Statute, irreparable injury to the public health and welfare is imminent or threatened. Regulation under these circumstances is left wholly to the states.

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In **International Union of United Automobile, Aircraft and Agricultural Workers of America, C.I.O., et al. v. O'Brien**, supra, it was said by Chief Justice Vinson at page 783, that, (Boldface ours):

"Without question, the Michigan provision conflicts with the exercise of federally protected labor rights. A state statute so at war with federal law cannot survive."

Also at page 784, Chief Justice Vinson said (Boldface ours):

" * * * Clearly, we reaffirmed the principle that if 'Congress has protected the union conduct which the state has forbidden * * * the state legislation must yield.' 336 U.S. at page 252, 69 S. Ct. at page 520. That principle is controlling here."

The case last cited is to be distinguished on its facts from the instant case for many reasons. In the first place, it was found that under the Michigan Statute, which was declared unconstitutional in part, the bargaining unit established in accordance with the Federal Law might be inconsistent with that required by the state regulation. It seems certain that a possible conflict in bargaining units cannot exist in the instant case.

It is because the operations of public utilities, as stated by the trial court, "Have long been subject to scrutiny by regulatory bodies set up by the state to protect the rights of the public", and because the Wisconsin Statute makes it an unfair labor practice for an employee to engage in concert with others to coerce or intimidate an employee in the enjoyment of his legal rights; to cooperate in engaging, promoting or reducing picketing unless a majority in a collective bargaining unit vote to call a strike or to take unauthorized possession of property of employer, or to engage in any considered effort to interfere with production, except by leaving the premises in an orderly manner for the purpose of going on strike, that the procedure outlined by the Wisconsin Statute does not conflict with the commerce clause or with the National Labor Relations Act or the Labor-Management Relations Act of 1947.

The case now being discussed is to be distinguished because as was said by Mr. Justice Jackson in **International Union, etc., v. Wisconsin Employment Relations Board**, *supra*, at page 524 (Boldface ours):

" * * * The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than

the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the Labor Relations Act. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 33, 57 S. Ct. 615, 622, 81 L. Ed. 893, 108 A.L.R. 1352."

Furthermore, the unconstitutionality of the strike vote provision of the Michigan labor mediation law was predicated upon the theory expressed by Senator Taft (93 Cong. Rec. 3835 (1947)) that there is a right to strike and that labor peace must be based on free collective bargaining. He added that, "We (the Congress) have done nothing to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation." And Your Honorable Court concluded that none of the relevant sections of the Federal statute "can be read as permitting concurrent state regulation of peaceful strikes for higher wages.

The labor disputes regulated by the Wisconsin statute are of a different character. This statute is not concerned merely with peaceful strikes for

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higher wages. Section 111.50 recognizes the fact that the interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare. Section 111.62 makes the "strike" coming within the purview of the statute a misdemeanor, in recognition of the serious threat to the public welfare of a strike among the employes engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication to the public of Wisconsin. Surely it was not the intent of Your Honorable Court to reverse the rule repeatedly announced since **Duplex Printing Press Co. v. Deering**, 254 U.S. 443 (1921) that a state legislature may mash the limits of tolerable industrial conflict in the public interest.

In addition, the attempt was made to apply the Michigan statute to a manufacturing corporation having plants in California and Indiana as well as Michigan. There was a federally certified bargaining representative for the bargaining unit covering the three states, although the unit for the Michigan strike vote could not extend beyond Michigan's voters. Herein, certainly, were the real potentials of conflict to suggest supremacy of Federal regulation.

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It is urged, therefore, that the instant case to be distinguished on its facts from **La Cross Telephone Corporation v. National Labor Relations Board**, *supra*, and **International Union of United Automobile, Aircraft and Agricultural Workers of America, C.I.O., v. O'Brien**, *supra*, and that upon the authorities cited in this brief the Judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 438

UNITED GAS, COKE AND CHEMICAL WORKERS
OF AMERICA, CIO, ARTHUR ST. JOHN, THOMAS
LANSING, AND AL FUHRMAN, PETITIONERS,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF WISCONSIN

PETITION FOR CERTIORARI FILED DECEMBER 6, 1950.

CERTIORARI GRANTED DECEMBER 11, 1950.



SUPREME COURT OF THE UNITED STATES

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OF AMERICA, CIO, ARTHUR ST. JOHN, THOMAS
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WISCONSIN EMPLOYMENT RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF WISCONSIN

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IN CIRCUIT COURT OF MILWAUKEE COUNTY

DECISION—March 14, 1950

This proceeding is before the court upon the petition of plaintiff, Wisconsin Employment Relations Board, for an order to show cause why defendant, United Gas, Coke & Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Chester Walczak and Thomas Lansing and other respondents named in the petition should not be punished as and for civil contempt for "failure to obey and disobeying the order of this court issued on the 5th day of October, 1949," ordering defendants "to absolutely desist and refrain from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service, and from picketing or causing to be picketed the premises of the Milwaukee Solvay Coke Company"; and further ordering

"The defendants, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C.I.O., Arthur St. John, Chester Walczak and Thomas Lansing, take immediate steps to notify all employees called out on strike to resume service forthwith."

The main above entitled action is brought pursuant to subchapter III of Chapter 111, Wisconsin stats.

[fol. 102] Subchapter III of Chapter 111, Wisconsin stats. provides:

"It is hereby declared to be the public policy of the state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions

of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees where the collective bargaining has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare."

The term "Public Utility Employer" is defined by section 111.51 as follows:

" 'Public utility employer' means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any or more of them, to the public in this state. This subchapter does not apply to railroads or railroad employees."

[fol. 103] " 'Essential service' means furnishing water, light, heat, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state."

It is provided by Subsection 111.61 (3) as follows:

"The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. * * *

It is the contention of defendants that Chapter 111 of the laws of Wisconsin and the subchapter just referred to are unconstitutional and in conflict with the National Labor Relations Act as amended by the National Labor Relations Act of 1947.

It is contended by plaintiff that the judgment in the declaratory judgment action brought by the Union in Milwaukee County circuit court in September, 1948, is res adjudicata as to the constitutionality and validity of Chapter 111, Wisconsin stats. The amended complaint in the declaratory judgment action alleged that the Union brought the action as the representative of the employees of the Milwaukee Gas Light Company; that defendant company is a public utility corporation and that the Wisconsin Employment Relations Board claims jurisdiction of the Company and the Union with the right to enjoin and restrain the Union and its members from quitting in concert to call a strike or go out on [fol. 104] strike or cause any work stoppage and alleged that subchapter III of Chapter 111 of the Laws of 1947 is unconstitutional and in conflict with the Thirteenth Amendment to the Constitution of the United States.

Defendants in the declaratory judgment action interposed general demurrers to plaintiff's amended complaint. After trial of the action upon issues raised by demurrers to the complaint, the following judgment was rendered:

"It is hereby adjudged and determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and does not deprive them of any rights, privileges or protection secured to them under either of said constitutions or act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.

"It is further adjudged that the prayer of the plaintiffs in the above entitled action for further relief be and the same hereby is denied.

This judgment of the circuit court of Milwaukee County was affirmed by the Supreme Court of Wisconsin on July

[fol. 105] 12, 1949. (*United G. C. & C. Workers vs. E. R. Board*, 255 Wis., 154.)

The purposes in the declaratory judgment action and in this proceeding are the same. The issues here raised with respect to the constitutionality and with respect to an alleged conflict with the National Labor Relations Act were litigated and decided in the declaratory judgment action. The judgment in the declaratory judgment action involving the same parties and the same issues is res adjudicata and is final and conclusive adjudication upon the question of the validity of Subchapter III of Chapter 111 of the Wisconsin statutes and precludes respondents from raising the same issue in the present proceeding.

Milwaukee Automobile Ins. Co. Limited Mutual vs. Felton (1939), 229 Wis. 29.

Montpelier Sav. Bank & Trust Co. vs. School Dist. 5, Town of Ludington (1902), 115 Wis., 622.

The rule is well established that a judgment sustaining a demurrer is an adjudication upon the merits.

Northern Pacific Railway vs. Slight, 205 U. S. 122.

It is well established that a judgment on demurrer is as conclusive as one rendered upon proof.

Gould vs. Evansville & Crawfordsville R. R. Co., 91 U. S. 526.

Bissel vs. Spring Valley Township, 124 U. S. 228;
Freeman on Judgments, Sec. 267.

[fol. 106] In *Ellis vs. The Northern Pacific Railroad Company*, 80 Wis., 459, the rule is stated as follows:

“* * * It is sufficient to say that by repeated decisions it has become the settled law in this state that the decision of this court upon a demurrer is conclusive upon the questions legitimately involved, and is res adjudicata in that case.”

The general rule applicable to actions brought in a representative capacity is stated as follows in 30 Am. Jur., Judgments, Section 228, page 962:

“* * * While the general rule is that no person is bound by a judgment except those who are parties or stand in privity with others who are parties, there is

an exception to the rule, of equal authority with the rule itself, in the case of persons who are virtually represented by persons on the record as parties. In such case, a judgment in favor of the parties representing the general class is operative under the doctrine of res adjudicata in favor of all who are thus represented, and a judgment against the parties representing the general class is operative against those represented. This doctrine does not depend upon statutory provisions; it is a rule of common law, founded on convenience and necessity. It is based upon the theory that the persons joined and not joined have a common interest, that the parties joined may be depended upon to bring forward the entire merits of the controversy as a protection to their own interests, and that the persons not joined as parties are sufficiently represented by those who are joined. * * *

• In Warner vs. Trow, 36 Wis., 195, the rule is stated as follows:

“* * * / In order to give full effect to the rule that the judgment of a court of competent jurisdiction is [fol. 107] final and conclusive upon the rights of the parties touching the subject matter of the suit, not only the parties themselves are held to be bound, but also all persons who are represented by the parties, and claim under them, or in privity with them, must be equally concluded by it. * * *

It must, therefore, be determined that Subchapter III of Chapter 111, Wisconsin stats. is a valid and constitutional law and does not violate any of the provisions of the Constitution of the state of Wisconsin or of the Constitution of the United States and is not in conflict with the National Labor Relations Act of 1947.

The testimony is undisputed that prior to October 5, 1949, the membership of the Union had authorized the Negotiating Committee to call a strike and on August 4, 1949, the Negotiating Committee, consisting of defendants, Arthur St. John and Thomas Lansing, and Alvin C. Fuhrman, ordered the strike to commence at 6:00 o'clock A. M. October 5, 1949. At 11:00 o'clock A. M. the public was advised to curtail consumption of gas and an appeal to consumers of gas was

made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could be done with the main pumping facilities; the fires had to be pulled from the boilers reducing the steam pressure and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that air would not get into the mains so as to prevent any explosions due to the mixture of gas and air in the distribution system; the sendouts dropped to 25 percent of what they had been previously. It was testified that low pressure in the system [fol. 108] created a dangerous condition fraught with the possibility of infinite injury to the public. The public was advised by radio broadcasts and through the newspapers to shut off appliances and to shut off the service at the meter. The service was not resumed until October 6, 1949.

The restraining order here under consideration was signed by the Court at 12:55 o'clock P. M. and was served by the deputy sheriff upon the Union by serving its president, Arthur St. John, and upon him personally and upon respondent, Chester Walczak, at a meeting of a large group of members of the Union at Bohemian Hall at about 2:00 o'clock P. M. October 5th. Chester Walczak and Arthur St. John told the meeting the papers served were an order to go back to work. No statement was made, however, by Chester Walczak or Arthur St. John at that meeting calling the men back to work. A picket line was formed at Milwaukee Solvay Coke Company at about 2:00 or 3:00 o'clock P. M. and continued there until 9:30 o'clock P. M. Wednesday, October 5, 1949.

It should be stated that defendants contend that the Milwaukee Coke Company is not a public utility and that, therefore, Subchapter III of Chapter 111 does not apply to it. The fact is, however, that in October, 1949, the Coke Company supplied from fifty-five to sixty percent of the gas distributed by the Gas Company. It was also testified and is undisputed that the Coke Company at other times supplied from fifty to eighty percent of the base load of gas. It was further testified that the distribution of gas [fol. 109] by the Milwaukee Gas Light Company to consumers in the Milwaukee area could not continue without a supply of gas from the Coke Company. Further, the testimony relating to the corporate relationship between the Milwaukee Gas Light Company and the Milwaukee Solvay Coke Company shows that the Milwaukee Gas Light Com-

pany owns one hundred percent of the stock of the Milwaukee Coke Company.

It must be held and it is so determined that because of the relationship between the Coke Company and the Gas Company, the Coke Company is a public utility within the statutory definition contained in Subchapter III of Chapter 111 (section 111.51).

Any determination of the issue now before the Court upon the petition of the plaintiff herein must be without regard to the merits of the controversy between the Milwaukee Gas Light Company, employer, and the defendant Union and of course any consideration of the merits of such controversy is wholly irrelevant to the proceeding now before the court.

The restraining order signed by the Court on October 5, 1949, was served and became effectual subsequent to the action of the Negotiating Committee calling the strike for 6:00 o'clock A. M. on October 5th. Therefore it can relate only to matters occurring subsequent to the issuance and service of the order. The strike, prior to the service of the order, had been voted upon by the membership of the Union and called by the Negotiating Committee as directed by the vote of the Union. The present proceeding therefore does [rel. 110] not relate back to the action of the Union, voting the strike or the act of the Negotiating Committee calling the strike for 6:00 o'clock A. M. on October 5th; but does relate to matters occurring subsequent to the signing of the order and the service of the same at 2:00 o'clock P. M. on October 5th. As already indicated, the order required defendants Union, Arthur St. John, Alvin C. Fuhrman and Thomas Lansing "to take immediate steps to notify all employees called out on strike to resume service." The order required immediate compliance because of the serious situation herein referred to resulting from the partial or complete stoppage of the essential service of furnishing gas to the public. On Arthur St. John, president of the Union and a member of the Negotiating Committee, Thomas Lansing, a member of the Executive Board of the Union and a member of the Negotiating Committee, and Alvin C. Fuhrman, vice-president of the Union and a member of the Executive Board and of the Negotiating Committee, was placed the responsibility by vote of the Union to call the strike and upon them rested the responsibility, after the

service of the restraining order, to revoke such call and comply with the order of the court. Failure to do so was a clear and distinct violation of the order of the court served upon defendants at two o'clock P. M. October 5, 1949. Their belief that such a call to the members of the Union to return to work would have been ineffectual by no means constitutes a justification for their failure to comply with the requirements of the court order.

[fol. 111] The law which plaintiff seeks to enforce may be controversial but until repealed or amended, it is the law and as indicated by the Attorney General "proper respect cannot be obtained for this law or any other or for the government itself unless such demands of the court are obeyed."

The Attorney General rightfully urges that the court should not be motivated by vindictiveness but that penalties "must be imposed which are adequate to make it plain that parties who disobeyed the order were in the wrong when they did so."

It is adjudged that the defendants, Arthur St. John, Thomas Lansing and Alvin C. Fuhrman, officers of the defendant Union and members of the Negotiating Committee, upon whom rested the responsibility of calling the strike, were guilty of wilful and contumacious civil contempt in failing to carry out the order of the court "to take immediate steps to notify all employees called out on strike to resume service forthwith."

And it is adjudged that defendant Arthur St. John, pay a fine in the sum of Two Hundred Fifty (\$250.00) Dollars or in the event of his failure so to do that he be committed to the County Jail of Milwaukee County for a period of two months under the Huber Law.

It is further adjudged that defendant Thomas Lansing, pay a fine in the sum of Two Hundred Fifty (\$250.00) Dollars or in the event of his failure so to do that he be committed to the County Jail of Milwaukee County for a period of two months under the Huber Law.

[fol. 112] It is further adjudged that defendant Alvin C. Fuhrman, pay a fine in the sum of Two Hundred Fifty (\$250.00) Dollars or in the event of his failure so to do that he be committed to the County Jail of Milwaukee County for a period of two months under the Huber Law.

And it is further adjudged that the defendant Union pay a fine of Two Hundred Fifty (\$250.00) Dollars.

Defendant, Chester Walezak, at the time in question was a Regional Director of the International Union but he was not a member of the Negotiating Committee and upon him did not rest the immediate duty to recall the strike as it did upon the members of such Negotiating Committee. His failure to disassociate himself from the continuance of the strike does not clearly appear to have been an act of wilful and contumacious civil contempt and the Court, therefore, finds that he was not guilty of wilful and contumacious civil contempt and the present proceeding for contempt is therefore dismissed as to him.

As to the other respondents named in the present proceeding to punish for civil contempt, the evidence does not sufficiently and clearly establish their knowledge of the scope and requirement of the court order, largely due to the failure of members of the Negotiating Committee to sufficiently inform the workers on the picket line of the requirements of such order.

The Court is of the opinion that the fact of wilful and contumacious civil contempt as to the other respondents has [fol. 113] not been clearly established and as to them the petition to punish for civil contempt is dismissed.

A suitable order conforming with this decision shall be prepared by the Attorney General and submitted to this court for its signature.

Dated, Milwaukee, Wisconsin, this 14th day of March, 1950.

Otto H. Breidenbach, Circuit Judge.

Cover.

Decision on motion—93 to 97.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The order of this court requiring the United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Thomas Lansing, Alvin Fuhrman, Peter Lupo, Charles Nutting, Al Helf, Cy Hackert, Ray Jonas, Charles Bauer, Al Smidoch, Peter Shank, Dan Burns, Joe Seborn, Dan Kabosky, Joe Marquardt, Fred Stockfish, and Chester Walezak, to show cause why they and each of them should not be

punished as for a civil contempt in failing to obey and disobeying the order of this court issued on the 5th day of October, 1949, having come on to be heard on the 16 and 17 days of January, 1950, before the Circuit Court of Milwaukee County, Branch No. 1, Honorable Otto H. Breiden-[fol. 114] bach presiding, and the petitioner appearing by Thomas E. Fairchild, Attorney General, and Beatrice Lampert, Assistant Attorney General, and the respondents appearing by Max Raskin and William Quick, and the court having heard the evidence and being fully advised in the premises, does hereby make the following findings of fact and conclusions of law:

Findings of Fact

1. That the order of this court issued in this proceeding on October 5, 1949, was duly served upon the respondents, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, and Arthur St. John and each of them at about 2:00 o'clock in the afternoon on Wednesday, October 5th during a meeting of said Local 18 at Bohemian Hall in the City of Milwaukee, Milwaukee County, Wisconsin; (that said order was also served upon the respondent, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18 by service at about 3 o'clock P. M. of said day upon members of the picket line established by said local before the premises of the Milwaukee Solvay Coke Company in said City of Milwaukee;) and that the respondent, Thomas Lansing, had notice that an order had been issued at about 3:00 o'clock in the afternoon of said day.

2. That said order commanded that the respondents named absolutely desist from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause an interruption of such service; absolutely desist from picketing or causing to be picketed the premises of said Milwaukee Solvay Coke Company; and take immediate steps to notify all employees called out on strike to resume services forthwith.

3. The Milwaukee Gas Light Company is a Wisconsin Corporation engaged in the business of furnishing light, heat and gas to the public in Milwaukee County, Wisconsin.

4. The Milwaukee Solvay Coke Company is a Wisconsin Corporation wholly owned by the Milwaukee Gas Light Company; that at all times involved in this proceeding said Coke Company was engaged in the business of manufacturing gas to be supplied to the Milwaukee Gas Light Company for distribution to the public in Milwaukee County, Wisconsin; that said Milwaukee Solvay Coke Company supplied during October, 1949, 55 to 60 per cent of the gas distributed to the public by the Milwaukee Gas Light Company and at other times has supplied from 50 to 80 per cent of the base load of gas distributed by said Milwaukee Gas Light Company.

5. That a strike of the employees of the Milwaukee Gas Light Company which was called by the Negotiating Committee of Local 18 for 6 A. M. October 5, 1949, was continued after service of the order described in Findings 1 and 2; that none of the respondents, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, [fol. 116] Arthur St. John, Thomas Lansing and Alvin C. Fuhrman, took any steps to notify any of the employees called out on strike to resume service until about 8 o'clock on the morning of October 6, at which time said respondents notified the employees that a settlement of the labor dispute between Local 18 and the Milwaukee Gas Light Company had been reached, that the strike had been won, and that employees should return to work.

6. That after service of the court's order, Local 18 caused the premises of the Milwaukee Solvay Coke Company to be picketed and caused picket signs to be displayed asking employees of the Coke Company to help Local 18 win its strike; that a picket line was maintained by Local 18 from about 3 o'clock in the afternoon of October 5 until about 11 o'clock P. M. on that day, and during the early part of the morning of October 6; that employees of the Coke Company refrained because of said line from performing their duties; and that said company was thereby prevented from manufacturing and supplying to the Milwaukee Gas Light Company all but a very small per cent of the amount of gas normally supplied.

7. That the Milwaukee Gas Light Company was prevented by said strike from distributing gas to the public on October 5 and 6; that it endeavored to maintain a minimum pressure in the distribution system in order to prevent air from getting into the mains and creating a condition likely to result in explosions, but that it was unable to maintain a sufficient pressure to avoid danger; that the company was compelled by the strike to make public request to consumers to shut off appliances and to turn off gas service at their meters.

8. That the respondents, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lansing and Alvin Fuhrman, and each of them, disobeyed and failed to obey the order of this court entered October 5, 1949 by encouraging a strike of the Milwaukee Gas Light Company, by encouraging picketing of the Milwaukee Solvay Coke Company, and by failing and neglecting to take steps to notify employees of the gas company called out on strike to resume service forthwith.

9. That said acts and conduct were calculated to, and actually did, defeat, impede and prejudice the rights and remedies of the Wisconsin Employment Relations Board, a party in said action, which is charged by statute with the duty to prevent violations of subchapter III of Chapter 111, Wis. Stats.

10. That the evidence does not sufficiently and clearly establish the knowledge of the other respondents above named of the scope and requirement of the court's order issued October 5, 1949.

CONCLUSIONS OF LAW

That United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lansing and Alvin C. Fuhrman are, and each of them is, guilty of wilful and contumacious civil contempt.

[fol. 118] That the evidence does not sufficiently and clearly establish wilful and contumacious civil contempt as to the other respondents above named.

Dated — — —, 1950.

By the Court, — — —, Circuit Judge.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

JUDGMENT

The order of this court requiring the United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Alvin C. Fuhrman, Thomas Lansing, Peter Lupo, Charles Nutting, Al Helf, Cy Hackert, Ray Jonas, Charles Bauer, Al Smidoch, Peter Shank, Dan Burns, Joe Seborn, Dan Kebosky, Joe Marquardt, Fred Stockfish, and Chester Walczak to show cause why they and each of them should not be punished as for a civil contempt in failing to obey and disobeying the order of this court issued on the 5th day of October, 1949, coming on to be heard on the ~~16~~ and 17 days of January, 1950, before the Circuit Court of Milwaukee County, Branch No. 1, Honorable Otto H. Breidenbach presiding, and the petitioner appearing by Thomas E. Fairchild, Attorney General, and Beatrice Lampert, Assistant Attorney General, and the respondents appearing by Max Raskin and William Quick, and the court having heard the evidence and being fully advised in the premises and having made and filed its findings of fact and conclusions of law pursuant to said decision.

Now, upon motion of Thomas E. Fairchild, Attorney [fol. 119] General, and upon all the records, files and proceedings herein,

1. It Is Adjudged and Decreed that United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lansing and Alvin C. Fuhrman are, and each of them is, guilty of civil contempt in having disobeyed and in failing to obey the order made by the court in this action on the fifth day of October, 1949.

2. That as punishment for said contempt the United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lansing and Alvin C. Fuhrman, and each of them, shall pay a fine in the sum of Two Hundred and Fifty Dollars (together with the costs and expenses of this proceedings in the amount of \$ _____ which costs and expenses shall be hereafter inserted in this judgment by the Clerk upon the filing by the petitioner, Wisconsin Employment Relations Board, of a bill of costs with necessary affidavits and proof of service upon the above named respondents).

3. That as to the respondents, Chester Walezak, Thomas Lansing, Peter Lupo, Charles Nutting, Al Helf, Cy Hackert, Ray Jonas, Charles Bauer, Al Smidoeh, Peter Shank, Dan Burns, Joe Seborn, Dan Kabosky, Joe Marquardt, Fred Stockfish, the petition of the Wisconsin Employment Relations Board to punish for civil contempt be and it is hereby dismissed.

Dated — —, 1950.

By the Court, — —, Circuit Judge.

[fo.. 120] IN CIRCUIT COURT OF MILWAUKEE COUNTY

VENUE TITLE ORDER

1 to 12 Proof of Service

Upon reading and filing the complaint of the Wisconsin Employment Relations Board in this action, and upon the sworn testimony of Henry C. Rule, member of such board, and on motion of Thomas E. Fairchild, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General,

It Is Ordered that the defendants and each of them show cause before the Calendar Judge of the Circuit Court of Milwaukee County at the court room of said court in the court house, Milwaukee, Wisconsin, on the 7th day of October, 1949, at 2 P. M. of said day why a temporary injunction should not be granted:

(a) restraining the defendants, Milwaukee Gas Light Company, Glen R. Chamberlain, B. T. Frank and B. J. Imse, and each of them, and their employes, servants and agents, from failing and neglecting to exert every reasonable effort to settle any labor dispute between the Milwaukee Gas Light Company and the representative of its employes and to prevent the collective bargaining process from reaching a state of impasse and stalemate;

(b) restraining the defendants, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur S. John, Chester Walezak and Thomas Lansing, and each of them, and their employes, servants, agents, members and all persons acting in concert

[fol. 121] with them, from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service and from picketing or causing to be picketed the premises of the Milwaukee Solvay Coke Company.

It Is Further Ordered that until the hearing of said order to show cause:

(a) the defendants, Milwaukee Gas Light Company, Glen R. Chamberlain, B. T. Frank, P. J. Imse, and each of them, and their employes, servants and agents, do desist and refrain from failing and neglecting to exert every reasonable effort to settle the labor dispute between said company and the representative of its employes and to prevent the collective bargaining process from reaching a state of impasse and stalemate;

(b) the defendants, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Chester Walezak and Thomas Lansing to absolutely desist and refrain from calling a strike, going out on strike, or causing any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such [fol. 122] service, and from picketing or causing to be picketed the premises of the Milwaukee Solvay Coke Company,

It Is Further Ordered that until the hearing of said order to show cause the defendants, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Chester Walezak and Thomas Lansing, take immediate steps to notify all employes called out on strike to resume service forthwith.

By the Court, Otto Breidenbach, Circuit Judge.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

SUMMONS AND COMPLAINT

Now comes the Wisconsin Employment Relations Board, the plaintiff above named, by Thomas E. Fairchild, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, its attorneys acting at its request, and for a cause of action alleges and shows to the court:

1. That the plaintiff (hereinafter referred to as the board) is and at all times mentioned herein was an administrative body created and existing pursuant to Ch. 111 of the Wisconsin Statutes; and that L. E. Gooding is the chairman and J. E. Fitzgibbon and Henry C. Rule are members of said board.

2. That the defendant, Milwaukee Gas Light Company (hereinafter referred to as the company), is a public utility [fol. 123] corporation organized and existing under the laws of the State of Wisconsin; that it is engaged in the business of furnishing gas for heat, light, cooking and other purposes to the public in Milwaukee County, Wisconsin; and that it is the only source from which such services can be obtained by the public in said county.

3. That the defendants, Glen R. Chamberlain, B. T. Frank, and P. J. Imse are the president, vice president and secretary respectively of the defendant Milwaukee Gas Light Company; that said named defendants are residents of Milwaukee County, Wisconsin, that more specific addresses are unknown to complainant and that they are proper representatives of the company for purposes of bargaining collectively with its employees.

4. That the defendant, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O. (hereinafter referred to as Local 18), is a voluntary labor organization organized and existing for the purpose of representing, and bargaining collectively on behalf of, certain employees; that said Local 18 is the bargaining representative of the employees who are engaged in the performance of production and maintenance work in the Meter Repair Shop, Service Shop, Third Ward Works, Street Department, West Works and the Meter Reading Departments of the Milwaukee Gas Light Company; and

that all of the employees so represented by Local 18 are engaged in the performance of service essential to the public as set forth in sec. 111.51 of the Wisconsin Statutes.

[fol. 124] 5. That Arthur St. John, Chester Waleczak and Thomas Lansing are respectively the president, business agent, and member of the Bargaining Committee of Local 18; and that they represent said Local 18 in collective bargaining between said local and Milwaukee Gas Light Company; that said defendants reside in Milwaukee County, Wisconsin; and that more specific address is unknown to complainant.

6. That a labor dispute exists between the Company and its employees represented by Local 18, with respect to various matters affecting wages, hours and other conditions of employment of employees of the Company.

7. That neither the company nor Local 18, nor any representative thereof, petitioned the board to appoint a conciliator pursuant to sec. 111.54 Stats., until after the board upon its own initiative found it necessary to make such an appointment.

8. Upon information and belief, that at a meeting held in the City of Milwaukee, Milwaukee County, Wisconsin, on the 4th day of October, 1949, Local 18 voted to call a strike of employees of the Milwaukee Gas Light Company; that public announcement of said action was made by the officials of Local 18 including the named defendants, Arthur St. John, Chester Waleczak and Thomas Lansing; that said Local 18 has called upon said employees to strike to begin October 5, 1949; that most of the employees of the company have discontinued work pursuant to such call, and all of the productive employees will be called out pursuant to such call by noon of October 5, 1949.

[fol. 125] 9. That said defendants have caused a picket line to be established at the premises of the Milwaukee Solvay Coke Company, a public utility employer located in the City of Milwaukee, Wisconsin, for one sole purpose of inducing and encouraging a strike and work stoppage of such employees; that said employees have been restrained by order of this Court from going out on strike; that maintenance of such picket line by the defendants is calculated and intended to cause a strike and work stoppage contrary to statute and contrary to the order of this Court.

10. That by such actions and other conduct said defendants did, during the months of September and October, 1949, instigate, induce, conspire with and encourage persons employed by the Milwaukee Gas Light Company to engage in a strike and work stoppage.

11. That the defendant, Milwaukee Gas Light Company and its officers above named as defendants, and each of them, have failed and neglected to exert every reasonable effort to settle the labor dispute between said Company and Local 18, and to prevent the collective bargaining process from reaching a state of impasse and stalemate.

12. That the Company is engaged in rendering essential service to the public in the State of Wisconsin and that the uninterrupted service of the employes who are represented by Local 18, and the employes of the Milwaukee Solvay Coke Company, is necessary to a continuance of the performance of such essential service; and that a strike or work stoppage in said companies would cause an interruption of such essential service.

[fol. 126] 13. That the defendants Local 18 and Arthur St. John, Chester Walczak and Thomas Lansing threaten to continue to instigate, induce, conspire with and encourage other persons to engage in a strike which will cause interruption of an essential service, and will continue to do so in violation of sec. 111.62, Wisconsin Statutes, unless restrained by judgment of this Court.

14. That the defendants, Milwaukee Gas Light Company, Glen R. Chamberlain, B. T. Frank, P. J. Imse are taking no action to conform to their obligation to exert every reasonable effort to settle a labor dispute and to prevent the collective bargaining process from reaching a state of impasse and stalemate, and will continue to fail to take such action, in violation of sec. 111.52 of the statutes, unless restrained from such violation by judgment of this Court.

15. That the board has a responsibility under sec. 111.62 of the Wisconsin Statutes for enforcement of compliance with the provisions of secs. 111.52 and 111.62.

16. That the conduct of the defendants, Milwaukee Gas Light Company, Glen R. Chamberlain, B. T. Frank and P. J. Imse in failing and neglecting to exert every reasonable effort to settle the labor dispute with Local 18 and to prevent the collective bargaining process from reaching a state of impasse and stalemate, and the conduct of the de-

defendants, Local 18 and Arthur St. John, Chester Walezak and Thomas Lansing in instigating, inducing, conspiring with and encouraging other persons to go out on strike, will [fol. 127] work irreparable injury to the complainant and to the citizens of the State of Wisconsin; will put the complainant to the necessity of bringing a multiplicity of suits; and that your complainant has no adequate remedy at law for redress against such conduct.

Wherefore complainant demands judgment that the defendants, Milwaukee Gas Light Company, Glen R. Chamberlain, B. T. Frank and P. J. Imse, and each of them, and their employes, servants and agents, be perpetually restrained and enjoined from failing and neglecting to exert every reasonable effort to settle any labor dispute between the Milwaukee Gas Light Company and the representative of its employes and to prevent the collective bargaining process from reaching a state of impasse and stalemate; and that the defendants, Local 18 and Arthur St. John, Chester Walezak and Thomas Lansing, and each of them, and their employes, servants, agents, members and all persons acting in concert with them be perpetually restrained and enjoined from calling a strike, going out on strike, or causing any work stoppage or slowdown which would cause an interruption of the service of the Company or of the Milwaukee Solvay Coke Company, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service; and from picketing or causing to be picketed the premises of the Milwaukee Solvay Coke Company; and for such other relief as may be appropriate in the premises.

[fol. 128] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

RESTRAINING ORDER

The order to show cause issued by this court on the 5th day of October, 1949 having come on for hearing at 2 p. m. on the 7th day of October, 1949 and Beatrice Lampert having appeared for the plaintiff and Max Raskin having appeared for the defendants, The United Gas, Coke and

[fol. 129] Chemical Workers of America, District 7, Local Union 18, Affiliated with the C. I. O., Arthur St. John, Chester Walczak and Thomas Lansing and Vernon A. Swanson having appeared for the defendants, Milwaukee Gas Light Company, Glen R. Chamberlain, B. T. Frank and P. J. Imse and it having been stipulated by and between the parties that the temporary restraining order should be continued until the final disposition of the issues upon their merits, Now, Therefore,

It is ordered that until the final judgment in the above entitled matter (a) the defendants, Milwaukee Gas Light Company, Glen R. Chamberlain, B. T. Frank, P. J. Imse, and each of them, and their employes, servants and agents, do desist and refrain from failing and neglecting to exert every reasonable effort to settle the labor dispute between said company and the representative of its employes and to prevent the collective bargaining process from reaching a state of impasse and stalemate; (b) the defendants, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Chester Walczak and Thomas Lansing to absolutely desist and refrain from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service, and from picketing [fol. 130] or causing to be picketed the premises of the Milwaukee Solvay Coke Company.

It is further ordered that until the hearing of said order to show cause the defendants, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Chester Walczak and Thomas Lansing, take immediate steps to notify all employes called out on strike to resume service forthwith.

Dated this — day of October, 1949.

By the Court. — — —, Circuit Judge.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

ANSWER OF LOCAL 18

Come now the answering defendants, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, and Arthur St. John and Chester Walmzak, and in answer to plaintiff's complaint allege as follows:

1. Admit the allegations contained in paragraph one.
2. Admit the allegations contained in paragraph two.
3. Admit the allegations contained in paragraph three, upon information and belief.
4. Admit the allegations contained in paragraph four.
5. Admit the allegations contained in paragraph five, except to state that one Thomas Lansing was not served with [fol. 131] any process, summons or complaint or order to show cause, and therefore no appearance is made on his behalf.
6. Admit the allegations contained in paragraph six.
7. Admit the allegations contained in paragraph seven.
8. Admit that on the 4th day of October, 1949, Local 18 voted to call a strike of the employees of the Milwaukee Gas Light Company.
9. Admit that said union established a picket line, in order to make it known to the world that the Milwaukee Gas Light Company had refused to enter into a contract with the said union.
10. These answering defendants admit the allegations contained in paragraph eleven of the complaint.
11. Admit the allegations contained in paragraph twelve.
12. Deny each and every other allegation and matter of fact set forth in the complaint and not specifically admitted.

In further answer to the plaintiff's complaint, those defendants allege as follows:

(a) That there is now pending in the District Court of the United States, Eastern District of Wisconsin, an action seeking to enjoin these proceedings, which was filed on October 3rd, 1949, wherein the plaintiff in the action at bar is the defendant, and the answering defendants at bar are [fol. 132] the plaintiffs, and the Milwaukee Gas Light Company is a defendant, a copy of which complaint is hereto attached and made part of this answer, marked Exhibit "A".

(b) That the defendant, Milwaukee Gas Light Company, hereinafter referred to as the defendant company, is a Wisconsin corporation and is a public utility employer with offices located at 626 East Wisconsin Avenue, Milwaukee, Wisconsin, and is primarily engaged in furnishing the following services: Illuminating and heating gas to the general public in the city and county of Milwaukee, Wisconsin. That it is engaged in commerce and trade affecting commerce, as defined in Sections 2 (6) and 2 (7) of the Labor Management Relations Act of 1947.

(c) The members of the Union, including these answering defendants, have assembled and associated themselves in the said Union for the purpose of collective bargaining and otherwise dealing with the defendant company concerning hours of employment, rates of pay, pensions, working conditions, grievances arising out of employment, and for other mutual aid and protection, and by such means to improve their economic and social conditions as citizens of the United States.

(d) The Labor Management Relations Act of 1947, adopted by the Congress, is a law regulating commerce as set forth in Section 101 and Section 204 of the Act as Amended. That since 1937, to August 1st, 1943, the defendant company recognized the defendant union as the exclusive bargaining representative for all of its employees [fol. 133] performing production and maintenance work, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment, and that on August 1st, 1943, the defendant union was duly certified by the National Labor Relations Board, acting under the National Labor Relations Act of 1935, as the exclusive bargaining representative for all of the employees of the defendant company in said unit, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment.

(e) That commencing with June, 1937, and annually thereafter including June, 1948, the defendant union and the defendant company entered into collective bargaining agreements for wages, hours of employment, and other working conditions of all of the employees represented by the said Union.

(f) That the most recent of such contracts was entered into between the defendant union and the defendant company on September 24th, 1948, which by its terms remained

in full force and effect until June 1st, 1949, and from year to year thereafter unless terminated by written notice on or before April 1st, of any year; that the defendant union terminated said agreement as of June 1st, 1949, by written notice to the defendant company prior to April 1st, 1949, as required by Section 8 (d) of the Labor Management Relations Act of 1947.

(g) That the Federal Mediation and Conciliation Service, acting under the Notice of Termination of Contract, copy of which was submitted to it, intervened and proceeded to assist in the negotiation of a contract for the year 1949-50.

[fol. 134] (h) That on September 19th, 1949, the defendant union filed a petition with the National Labor Relations Board, charging the defendant company with having violated Section 8 (a) (5) of the Labor Management Relations Act of 1947, in that it was guilty of an unfair labor practice for having failed and refused to bargain collectively with the defendant union, the duly authorized bargaining representative of the majority of the employees in the bargaining unit, and that such petition is now pending before the National Labor Relations Board.

(i) Subsequent to the filing of the aforesaid petition with the National Labor Relations Board, defendant company did enter into collective bargaining with the defendant union covering wages, pensions, hours and other conditions of employment.

(j) That on October 4th, 1949, these answering defendants, because of the failure of the defendant company to compromise upon and agree to wages, pensions and other working conditions, left the employment of the defendant company individually, in concert, and in agreement with others, and commenced to peacefully picket the defendant company premises.

(k) That the Circuit Court of Milwaukee County has no jurisdiction of the subject matter of this suit, in which said restraining order was issued, for the reason that subchapter 3, Chapter 111, of the Wisconsin Statutes of 1947, is in direct conflict with the United States Labor [fol. 135] Management Act of 1947, and the declared public policy of the United States.

(l) That on October 6th, 1949, defendant union and the defendant company agreed upon wages, hours and other conditions of employment, but have not agreed on the exact

terms and conditions of the pension plan for the employees of the defendant company for whom the defendant union is authorized to bargain; that the defendant company threatens to invoke Section 111.55 and other provisions of subchapter 3, Chapter 111, Wisconsin Statutes of 1947, to compel these answering defendants to agree to a pension plan as may be determined by a board of arbitrators provided for in said Statutes.

(m) That subchapter 3 of Chapter 111 of the Wisconsin Statutes of 1947 is in direct conflict with the Labor Management Relations Act of 1947, in that such Wisconsin Act denies these defendants the right to bargain collectively, but compels them to accept a contract drawn by strangers to them, and without their consent or approval.

(n) That the threatened act of the plaintiff herein to compel these answering defendants to accept a contract drawn by strangers to them deprives them of their fundamental constitutional right to make and enter into their own labor agreement covering wages, hours and other conditions of employment.

(o) That under the Labor Management Relations Act of 1947, and under the Constitution of the United States, these [fol. 136] answering defendants, should they fail in negotiating a labor contract with the defendant company, have the right to leave their place of employment, either individually or in concert, but under Section 111.62 it is unlawful for these answering defendants to leave their place of employment, should they fail to reach an agreement with the defendant company, in concert or in agreement with others under penalty of confinement in the common jail.

(p) That a majority in the collective bargaining unit of the employees of the Milwaukee Gas Light Company represented by the defendant Union herein voted by secret ballot to call a strike.

(q) That all picketing and other concomitants of the strike were carried out in a peaceful and orderly manner.

(r) That the strike on October 6th, 1949, was terminated and all employees have since returned to their regular line of duty.

(s) In further answer to plaintiff's complaint, these answering defendants state that the decision to call a strike was reached by the union on Tuesday night, October 4th, 1949, and that the following morning, October 5th, 1949,

various individuals, in a peaceful and proper manner, picketed the premises of the defendant company.

That the complaint to which these answering defendants make answer was served upon said answering defendants at approximately 2:00 o'clock P. M. October 5th, 1949. That immediately thereafter these answering defendants sought the assistance of Frank Zeidler, Mayor of the city of [fol. 137] Milwaukee, to make contact with the defendant company for the purpose of conciliating the differences then existing between the company and the union. That upon information and belief, the Mayor sought to make such contact.

That at about 4:00 o'clock P. M. these answering defendants further sought the assistance of Robert E. Tehan, Judge of the United States District Court, in conciliating the differences then existing between the company and the union, and that thereafter a conference was called between these defendants and others representing the union, and constituting the bargaining committee and the representatives of the company, to meet in the chambers of the United States District Court at 7:00 o'clock P. M.; that at such time, or as soon thereafter as possible, such meeting was held, and continued without interruption of any kind until an agreement was reached between the parties which agreement was executed at approximately 8:45 o'clock A. M. Thursday morning, October 6th, 1949.

Wherefore these answering defendants demand the plaintiff's complaint and all proceedings thereon be dismissed.

Max Raskin, Attorney for Answering Defendants.

[fol. 138]

EXHIBIT "A" TO ANSWER

U. S. DISTRICT COURT

Amended Complaint

Civil Action No. 4844

For their amended complaint, plaintiffs allege that:

1. This is a suit of a Civil nature seeking an injunction and a declaratory judgment, and arises under the Constitution of and the laws of the United States:

2. The jurisdiction of the court is based upon:

(a) The matter in controversy exceeds, exclusive of interest and costs, the sum of ~~Three~~ Thousand Dollars (\$3000.00) pursuant to Section 1331 of Title 28 of the U. S. C. A.

(b) The suit arises under the United States laws regulating commerce, pursuant to Section 24 (1) (8), Title 28, U. S. C.

(c) Plaintiffs seek to redress the deprivation under color of a state law their right, privilege and immunity secured by the Constitution of the United States and an act of Congress, providing for equal rights of citizens or of all persons within the jurisdiction of the United States, pursuant to Section 1343 of Title 28 of the United States Code.

3. The plaintiff, Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and hereinafter referred to as the [fol. 139] Union, is an unincorporated association of employees employed in the production, maintenance, operation, construction and meter reading, of approximately seven hundred seventy (770) in number, all of whom are employed with the defendant, Milwaukee Gas Light Company, and that the office of the said Union is in the city of Milwaukee, Milwaukee County, Wisconsin; that it is a labor organization as defined in Section 2 (5) of the Labor Management Relations Act of 1947.

4. The plaintiff, Chester Walczak, is a citizen of the United States and a resident of the city and county of Milwaukee, Wisconsin, residing at 3350 North Richards Street, and is the International Representative of said Union.

5. The plaintiff, Arthur St. John, is a citizen of the United States, and a resident of Waukesha County, Wisconsin, residing at Route 12, Box 529, and is the President of the said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Five Hundred Dollars (\$3500.00).

6. The plaintiff, Al Fuhrman, is a citizen of the United States, and a resident of Milwaukee County, Wisconsin, residing at 6308 Beloit Road, West Allis 14, and is the Vice president of the said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Three Hundred Dollars (\$3300.00).

[fol. 140] 7. The plaintiff, Emil Heimsch, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, residing at 1054 North 46th Street, and is the Chairman of the Bargaining Committee of the Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Seven Hundred Dollars (\$3700.00).

8. The plaintiff, Thomas Lansing, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, residing at 2779 South Superior Street, and is a member of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Five Hundred Dollars (\$3500.00).

9. The plaintiff, John F. Sheehan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2518 South 11th Street, Milwaukee, and is a member of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Two Hundred Dollars (\$3200.00).

10. That the plaintiff, E. F. Regner, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2371 South 79th Street, West Allis 14, and is a member of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Three Hundred Dollars (\$3300.00).

[fol. 141] 11. The plaintiff, Edward P. Regan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2933 North Cramer Street, and is a member of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand One Hundred Dollars (\$3100.00).

12. The plaintiff, La Moine S. Cardinal, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 1435 West Kilbourn Avenue, and is a member of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Thirty-two Hundred Dollars (\$3200.00).

13. The plaintiff, Gordon Donnelly, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin,

residing at 2134A North 2nd Street, and is the recording secretary of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand One Hundred Dollars (\$3100.00).

14. The defendant, L. E. Gooding, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Fond du Lac, Winnebago County, Wisconsin. The defendant, J. E. Fitzgibbon, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the [fol. 142] United States, and a resident of the city of Milwaukee, Milwaukee County, Wisconsin. The defendant, Henry C. Rule, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Eau Claire, Eau Claire County, Wisconsin. That all of said defendants constitute the Wisconsin Employment Relations Board, which has offices at 110 East Wisconsin Avenue, Milwaukee, Wisconsin. That said Wisconsin Employment Relations Board is established pursuant to and under the Statutes of the State of Wisconsin, Section 111.03 Wis. Stats. of 1947, and is composed of the aforesaid Commissioners; that said Board has for its duty the enforcement and compliance with Subchapter 3 of Chapter 111 of the Laws of the State of Wisconsin titled "Public Utilities" as set forth in Sections 111.50 through 111.64 Wisconsin Statutes of 1947.

15. The defendant, Thomas E. Fairchild, is the duly elected, qualified and acting Attorney General of the State of Wisconsin, and as such is charged with the enforcement of the laws of the State of Wisconsin; is a citizen of the United States and is a resident of the city of Madison, Dane County, Wisconsin.

16. That the defendant, Milwaukee Gas Light Company, hereinafter referred to as the defendant company, is a Wisconsin corporation and is a public utility employer with offices located at 606 East Wisconsin Avenue, Milwaukee, Wisconsin, and is primarily engaged in furnishing the following services: Illuminating and heating gas [fol. 143] to the general public in the city and county of Milwaukee, Wisconsin. That it is engaged in commerce

and trade effecting commerce, as defined in Sections 2 (6) and 2 (7) of the Labor Management Relations Act of 1947.

17. The plaintiffs bring this action on behalf of themselves and all others similarly situated, that is to say, the members of the Union who are also employees of the defendant company, and are authorized so to do.

18. That the annual earnings of all of such members of the Union as employees of the defendant company is approximately Two Million Three Hundred Ten Thousand Dollars (\$2,310,000.00).

19. The members of the Union, including the plaintiffs, have assembled and associated themselves in the said Union for the purpose of collective bargaining and otherwise dealing with the defendant company concerning hours of employment, rates of pay, pensions, working conditions, grievances arising out of employment, and for other mutual aid and protection, and by such means to improve their economic and social conditions as citizens of the United States.

20. The Labor Management Relations Act of 1947, adopted by the Congress, is a law regulating commerce as set forth in Section 101 and Section 204 of the Act as Amended. That since 1937, to August 1st, 1943, the defendant company recognized the plaintiff Union as the exclusive bargaining representative for all of its employees performing production and maintenance work, for the purpose of [fol. 144] bargaining with respect to rates of pay, hours of employment, and other conditions of employment, and that on August 1st, 1943, the plaintiff union was duly certified by the National Labor Relations Board, acting under the National Labor Relations Act of 1935, as the exclusive bargaining representative for all of the employees of the defendant company in said unit, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment.

21. That commencing with June, 1937, and annually thereafter including June, 1948, the plaintiff union and the defendant company entered into collective bargaining agreements for wages, hours of employment, and other working conditions of all of the employees represented by the said Union.

22. That the most recent of such contracts was entered into between the plaintiff union and the defendant company on September 24th, 1948, which by its terms remained in

full force and effect until June 1st, 1949, and from year to year thereafter unless terminated by written notice on or before April 1st, of any year; that the plaintiff union terminated said agreement as of June 1st, 1949, by written notice to the defendant company prior to April 1st, 1949, as required by Section 8 (d) of the Labor Management Relations Act of 1947.

23. That the Federal Mediation and Conciliation Service, acting under the Notice of Termination of Contract, copy of which was submitted to it, intervened and proceeded to assist in the negotiation of a contract for the year 1949-50. [fol. 145] 24. That the probable earnings of all of such employees represented by the plaintiff union for a contemplated contract for the year 1949-50 is Two Million Three Hundred Ten Thousand Dollars (\$2,310,000.00).

25. That on September 19th, 1949, the plaintiff union filed a petition with the National Labor Relations Board, charging the defendant company with having violated Section 8 (a) (5) of the Labor Management Relations Act of 1947, in that it was guilty of an unfair labor practice for having failed and refused to bargain collectively with the plaintiff union, the duly authorized bargaining representative of the majority of the employees in the bargaining unit, and that such petition is now pending before the National Labor Relations Board.

26. Subsequent to the filing of the aforesaid petition with the National Labor Relations Board, defendant company did enter into collective bargaining with the plaintiff union covering wages, pensions, hours and other conditions of employment.

27. That on October 4th, 1949, the plaintiffs, because of the failure of the defendant company to compromise upon and agree to wages, pensions and other working conditions, left the employment of the defendant company individually, in concert, and in agreement with others, and commenced to peacefully picket the company premises.

28. That the defendant, Wisconsin Employment Relations Board, acting under the purported authority of Section 111.63 Wisconsin Statutes 1947, secured an injunction from the Circuit Court of Milwaukee County, restraining the plaintiffs from leaving their place of employment in concert or in agreement with others, and from picketing or otherwise violating the provisions of subchapter 3, Chapter 111 of the Wisconsin Statutes of 1947.

That the Circuit Court of Milwaukee County had no jurisdiction of the subject matter of this suit, in which said restraining order was issued, for the reason that subchapter 3, Chapter 111, of the Wisconsin Statutes of 1947, is in direct conflict with the United States Labor Management Act of 1947, and the declared public policy of the United States.

29. The defendant Attorney General, together with the defendant Wisconsin Employment Relations Board, has since caused the issuance of process to punish the plaintiffs and other employees of the defendant company for whom this action is brought, for allegedly violating the injunction of the Circuit Court and subchapter 3, Chapter 111 of the Wisconsin Statutes of 1947; that unless the relief prayed for herein is granted by this court the plaintiffs and others for whom they are authorized to act will be subjected to fines or imprisonment, or both.

30. The defendant Attorney General of the State of Wisconsin, acting through the District Attorney of Milwaukee County, unless the relief prayed for herein is granted by this court, threatens to invoke the criminal penalties prescribed by the said Section 111.62 of subchapter 3, Chapter 111 of the Wisconsin Statutes of 1947, against the plaintiffs [fol. 147] and others for whom said plaintiffs are authorized to act, and that said threatened action by the defendant Attorney General is unlawful for the reason that such action is repugnant to the Constitution and laws of the United States.

31. That on October 6th, 1949, plaintiff union and the defendant company agreed upon wages, hours and other conditions of employment, but have not agreed on the exact terms and conditions of the pension plan for the employees of the defendant company for whom the plaintiff union is authorized to bargain; that the defendant company threatens to invoke Section 111.55 and other provisions of subchapter 3, Chapter 111 Wisconsin Statutes of 1947, to compel the plaintiffs to agree to a pension plan as may be determined by a board of arbitrators provided for in said Statutes.

32. That the defendants, L. E. Gooding, J. E. Fitzgibbons and Henry C. Rule, as the Wisconsin Employment Relations Board, and the defendant Thomas E. Fairchild as the Attorney General, threaten to compel the plaintiffs to submit the unresolved issue of pensions involved in the negotia-

tions, to arbitration, and to accept and abide by the result of such arbitration under penalty of confinement in the common jail.

33. That on the 28th day of September, 1949, the defendant company filed with the Wisconsin Employment Relations Board a petition, a copy of which is herewith attached and marked Exhibit "A" and made part of this amended complaint.

34. That on October 3rd, 1949, the defendant, Wisconsin Employment Relations Board, issued an order, a copy of [fol. 148] which is attached hereto and marked Exhibit "B", directing the plaintiffs to choose arbitrators as provided in subchapter 3, Chapter 111 of Wisconsin Statutes of 1947, and that such order issued under the purported authority of the Wisconsin Statutes has not been revoked, and remains as threatened by the Wisconsin Employment Relations Board, binding upon the plaintiffs.

35. That the order, and threatened action of both the defendant Wisconsin Employment Relations Board and the Attorney General are all in conflict with the United States Labor Management Relations Act of 1947, and is repugnant to the Constitution of the United States.

36. That the Wisconsin Employment Relations Board and the defendant company claim to act under authority of subchapter 3 of Chapter 111 of the Laws of the State of Wisconsin, 1947, the material parts of which are as follows:

"111.55. Conciliator unable to effect settlement; appointment of arbitrators. If the conciliator so named is unable to effect a settlement of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute."

[fol. 149] "111.56. Status quo to be maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment

shall not be changed by actions by either party without the consent of the other."

"111.62. Strikes, work stoppages, slowdowns, lock-outs, unlawful; penalty. It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor."

"111.63. Enforcement. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply."

37. That the aforesaid provisions of the laws of the State of Wisconsin are in direct conflict with the Labor Management Relations Act of 1947, in that such Wisconsin Acts [fol. 150] deny plaintiffs the right to bargain collectively, but compel them to accept a contract drawn by strangers to them, and without their consent or approval.

38. That the threatened act of the defendants to compel the plaintiffs to accept a contract drawn by strangers to them deprives them of their fundamental constitutional right to make and enter into their own labor agreement covering wages, hours and other conditions of employment.

39. That under the Labor Management Relations Act of 1947, and under the Constitution of the United States, the plaintiffs, should they fail in negotiating a labor contract

with the defendant company, have the right to leave their place of employment, either individually or in concert, but under Section 111.62 it is unlawful for the plaintiffs to leave their place of employment, should they fail to reach an agreement with the defendant company, in concert or in agreement with others under penalty of confinement in the common jail.

40. That it is therefore essential in the judgment of the plaintiffs that they exercise their rights as citizens, including the right to enter into a collective bargaining agreement without restraint, coercion or compulsion on the part of the defendants, and including the right of free speech and assembly and petition, and the right to leave their place of employment individually, in concert, or in agreement with others, should they fail to enter into a collective bargaining agreement with the defendant company.

[fol. 151] 41. That the plaintiffs seek to enjoin and perpetually restrain the defendants:

(a) from interfering with the plaintiffs' right, privilege and immunity secured to them by the Constitution of the United States and the Labor Management Relations Act of 1947; from entering into a contract or agreement with the defendant company on the issue of pensions, or any other negotiable issue voluntarily, and in the absence of that, from leaving their place of employment individually, in concert or in agreement with others;

(b) from taking any steps, issue any process in the Circuit Court of Milwaukee County which seeks to impose a penalty by way of a fine or imprisonment or both, upon the plaintiffs or others similarly situated, for allegedly violating the restraining order of the Circuit Court of Milwaukee County issued on October 5th, 1949;

(c) from taking any steps, signing any complaint, issuing any warrant, or threatening to do any such acts, which have for their purpose the arrest or punishment of the plaintiffs by fine or imprisonment, or to otherwise enforce the penalties of subchapter 3, Chapter 111 of the Wisconsin Statutes of 1947.

42. For all of the aforesaid reasons there is a real and justiciable case and an actual controversy between these plaintiffs and the defendants; the defendant Wisconsin Employment Relations Board and its Commissioners, and the

defendant Attorney General, in threatening to enforce an unconstitutional and void statute, are acting outside their [fol. 152] authority as officers of the State of Wisconsin; plaintiffs have no adequate or timely remedy at law and they will suffer irreparable injury, and that unless the relief herein prayed for is granted they will be in jeopardy and will be forced to defend many criminal prosecutions and other proceedings in court, and will be forced to expend large sums of money in defending such suits, and the hazards of fines and imprisonments upon the plaintiffs and other similarly situated; that plaintiffs are and will thereby be deprived of their rights under the constitution and the laws of the United States, to enjoy the rights of free citizens of the United States.

43. This suit for a declaratory judgment and injunction offers plaintiffs the only remedy to secure an adjudication of the validity of subchapter 3, Chapter 111 of Wisconsin Statutes of 1947 in time to exercise their rights as citizens of the United States.

44. That the threatened acts of the defendants, and the laws under which they seek to impose such acts, unlawfully restrict and abridge the civil rights of the plaintiffs by denying them the freedom of speech and the right of peaceful assembly and petition; unlawfully limits their freedom to join in a labor organization, and to make effective use of any joint action on their part, and thereby deprives them of their liberty and their property without due process of law; unlawfully prevents them from entering into contracts of employment by their own act and thereby prohibits them from the right of contract; unlawfully and arbitrarily dis-[fol. 153] criminate against the plaintiffs by reason that they are employees of a public utility and prohibits them from using their joint efforts in arriving at a voluntary labor contract covering their wages, hours, and other conditions of employment, and thereby deprives them of the equal protection of the law as citizens of the United States, and that such classification is arbitrary, grossly discriminatory, invidious, and is repugnant to the Constitution of the United States; unlawfully invades the rights and liberties of the plaintiffs by seeking to compel them to remain at their place of employment, and that such acts are in violation and repugnant to the laws and Constitution of the United States.

Wherefore plaintiffs pray that:

(a) The defendants be directed full, true and perfect answer to make to this complaint.

(b) A three judge court be convened pursuant to the provisions of Title 18, U. S. Code, Section 380.

(c) The defendants, and each of them, be restrained and enjoined from taking any action or proceeding, make any threat to take any action or proceeding, to compel the plaintiffs to submit to arbitration, or to enter into a labor contract on any negotiable issue, against their will and judgment, or petition any court of record or file any complaint seeking to compel the plaintiffs to submit to arbitration; or take any steps or file any complaint, or pursue any proceeding which would seek to punish the plaintiffs for allegedly violating any court order issued under the purported authority of subchapter 3, Chapter 111 of Wisconsin Statutes, 1947; or to take any steps, file any complaint, issue any warrant or other process, or threaten to do so, seeking to arrest or otherwise punish by fine or imprisonment, the plaintiffs or others for whom they are authorized to act, for allegedly violating any of the provisions of subchapter 3, Chapter 111 Wisconsin Statutes of 1947.

(d) That the court issue a permanent injunction enjoining and restraining the defendants and their agents from taking steps to enforce the penalties of subchapter 3, Chapter 111 of Wisconsin Statutes of 1937, or other provisions thereof, which interfere with the rights of the plaintiffs as citizens of the United States, and which are in conflict with the laws of the United States and the Constitution of the United States.

(e) This court issue a judgment declaring that the provisions of subchapter 3, Chapter 111 of the Wisconsin Statutes of 1947, insofar as they may be applied to penalize these plaintiffs and others for whom they are authorized to act, to compel them to submit to arbitration on any negotiable issue or which has for its purpose the punishment of the plaintiffs for having left their place of employment in concert or in agreement with others, or for having picketed the defendant company's premises, are void, illegal, unenforceable and repugnant to the United States Labor Management Relations Act of 1947, and to the Constitution of the United States.

[fol. 155] (f) The plaintiffs have such other and further relief as to the court may seem just and equitable.

Max Raskin, Attorney for Plaintiffs. Suite 1801
Wisconsin Tower, 606 W. Wisconsin Avenue, Milwaukee, Wisconsin.

EXHIBIT "A" TO EXHIBIT "A"

Before the Wisconsin Employment Relations Board

In the Matter of the PETITION OF MILWAUKEE GAS LIGHT COMPANY for Appointment of a Conciliator Pursuant to Section 111.54 of the Wisconsin Statutes for 1947

The petition of Milwaukee Gas Light Company represents and shows as follows:

1. The petitioner, Milwaukee Gas Light Company, is a Wisconsin corporation and is a public utility employer within the meaning of subchapter III of Chapter 111 of the Wisconsin Statutes of 1947; and its principal office is located at 606 East Wisconsin Avenue, Milwaukee 2, Wisconsin.

2. The petitioner is primarily engaged in furnishing essential service within the meaning of Section 111.51 of the Wisconsin Statutes for 1947, to-wit, illuminating and heating [fol. 156] gas to the general public in the City and County of Milwaukee, Wisconsin.

3. Petitioner employs a total of approximately One Thousand Three Hundred Ten (1,310) employees. Approximately Seven Hundred Seventy (770) employees of the petitioner, engaged in production, maintenance, operation, construction and meter reading, constitute a separate collective bargaining unit, and are represented for collective bargaining purposes by a labor organization, to-wit, Local 18, United Gas, Coke and Chemical Workers of America (CIO), hereinafter referred to as the "Union".

4. Petitioner and said union executed a Labor Agreement of September 24, 1948, which by its terms remained in full force and effect until June 1, 1949, and from year to year thereafter unless terminated by written notice on or before April first of any year; and the Union terminated said agreement as of June 1, 1949, by written notice to the Company prior to April 1, 1949.

5. Petitioner has attempted in good faith to negotiate the terms of a labor agreement with the Union but has not been able to reach an agreement with the Union, although John E. Roe, Madison, Wisconsin, was appointed as Conciliator by order of the Wisconsin Employment Relations Board, dated September 14, 1949, and participated in several meetings between petitioner and the Union; and petitioner believes said collective bargaining negotiations have reached an impasse and stalemate and that said parties will be unable to effect settlement of said dispute without the intervention, aid and assistance of the conciliation and/or arbitration processes and procedures provided for in Sections 111.50 through 111.65 of the Wisconsin Statutes for 1947.

6. Petitioner is informed and believes that said dispute if not settled will cause or is likely to cause an interruption of said essential service, to-wit, the furnishing of illuminating and heating gas to residents of the City and County of Milwaukee, Wisconsin.

Wherefore, your petitioner requests that pursuant to Section 111.54 of the Wisconsin Statutes for 1947, the Wisconsin Employment Relations Board reappoint said John E. Roe, or appoint such other person as it may select, as conciliator to meet with said parties for the purposes set forth in Sections 111.54 and 111.55 of the Wisconsin Statutes for 1947.

Dated at Milwaukee, Wisconsin, this 28th day of September, 1949.

Milwaukee Gas Light Company, by Glenn R. Chamberlain, President.

STATE OF WISCONSIN,
Milwaukee County, ss.

Glenn R. Chamberlain, being first duly sworn, on oath deposes and says that he is President of petitioner and makes this verification for and in its behalf by its authority; the foregoing petition is true to his own knowledge except [fol. 158] as to those matters therein stated on information and belief and as to those matters he believes it to be true; that the reason this petition is not made by plaintiff is that said plaintiff is a corporation; that he is such officer as aforesaid and the sources of his knowledge and the grounds

of his belief are his connections with the affairs of said Company as such officer and the records and papers of said petitioner in his possession.

Glen R. Chamberlain.

Subscribed and sworn to before me this 28th day of September, 1949. Roy M. Sheehy, Notary Public, Milwaukee County, Wisconsin. My Commission expires July 23, 1952. (Notarial Seal.)

STATE OF WISCONSIN

[fol. 159] "EXHIBIT "B" TO EXHIBIT "A"

Before the Wisconsin Employment Relations Board
In the Matter of the Dispute Between the MILWAUKEE GAS
LIGHT COMPANY AND UNITED GAS, COKE AND CHEMICAL
WORKERS OF AMERICA, LOCAL NO. 18, Affiliated with the
Congress of Industrial Organizations.

ORDER APPOINTING ARBITRATORS

The Wisconsin Employment Relations Board having heretofore and on the 14th day of September, 1949, upon its own motion appointed John E. Roe of Madison, Wisconsin, as conciliator pursuant to Section 111.54 of the Wisconsin Statutes for the purpose of attempting to settle a dispute existing between the employees of the Milwaukee Gas Light Company represented by the United Gas, Coke and Chemical Workers of America, Local No. 18, affiliated with the Congress of Industrial Organizations, and that the Company and the said John E. Roe having on the 3rd day of October, 1949, reported to the Board that the dispute between the parties continues to exist, and from such report it appearing that a continuation of the dispute will cause or is likely to cause the interruption of the essential service:

Now, therefore, it is

ORDERED

That pursuant to Section 111.55 of the Wisconsin Statutes the following named persons, all of whom have qualified as arbitrators under the provisions of Section 111.53 of

the Wisconsin Statutes, be submitted to the parties as the persons from which the board of arbitration to determine such dispute shall be elected, to-wit: Nathan P. Feinsinger, Madison, Wisconsin; Herman Runge, Sheboygan, Wisconsin; Carl J. Ludwig, Milwaukee, Wisconsin; Milton LePour, Racine, Wisconsin; and Carl Rix, Milwaukee, Wisconsin.

It is Further Ordered that the representatives of the Milwaukee Gas Light Company and the United Gas, Coke and Chemical Workers of America, Local No. 18, affiliated with the Congress of Industrial Organizations, meet at the Court House in the City of Milwaukee, County of Milwaukee, Wisconsin, on Friday, October 7, 1949, at 10:00 o'clock in the forenoon, at which time each party may strike the name of one person from the list of names above submitted. The remaining three persons will be designated by the Board as the Board of Arbitration to which will be sub-[fol. 161] mitted the issues in dispute between the parties.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of October, 1949.

Wisconsin Employment Relations Board, by (S.)
L. E. Gooding, Chairman; J. E. Fitzgibbon, Commissioner; Henry C. Rule, Commissioner.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

Answer of Milwaukee Gas Company

The defendants, Milwaukee Gas Light Company, Glenn R. Chamberlain, B. T. Franck and P. J. Imse, by Miller, Mack & Fairchild, their attorneys, for answer to the complaint herein:

1. Admit the allegations contained in paragraph 1 of said complaint.
2. Admit the allegations contained in paragraph 2 of said complaint, except that they allege that there is a small and inconsiderable section of Milwaukee County lying outside the limits of the City of Milwaukee in which similar services are rendered by another utility.
3. Admit the allegations contained and set forth in paragraph 3 of said complaint.

[fol. 162] 4. Admit the allegations contained and set forth in paragraph 4 of said complaint.

5. Admit the allegations contained and set forth in paragraph 5 of said complaint.

6. Admit that on October 5, 1949, a labor dispute did exist between the Milwaukee Gas Light Company and its employees represented by Local 18 mentioned in said complaint. Allege that on October 5, 1949, at about 7:00 o'clock in the forenoon, a strike was called and put into effect by said Local and the members thereof; that a settlement was reached as a result of which said strike was terminated during the morning of October 6, 1949, and that said employees returned to work during said day; that certain aspects of the issue involving pensions in said dispute have been reserved for further negotiation; and that no impasse or stalemate has been reached in respect thereto.

7. Admit the allegations contained and set forth in paragraph 7 of said complaint.

8. Admit the allegations contained and set forth in paragraph 8 of said complaint, except as qualified by the allegations contained and set forth in paragraph 6 of this answer.

9. Deny that these answering defendants caused any picket line to be established or had anything to do with the maintenance of the picket line referred to in said paragraph.

10. Deny that these answering defendants at any time instigated, induced, conspired with or encouraged any persons employed by the defendant Milwaukee Gas Light Company [fol. 163] to engage in a strike or work stoppage.

11. Deny each of the allegations contained and set forth in paragraph 11 of said complaint, and allege with respect thereto that defendants exerted every reasonable effort to settle said labor dispute between Milwaukee Gas Light Company and said Union and to prevent the collective bargaining process from reaching a state of impasse and stalemate.

12. Admit the allegations contained and set forth in paragraph 12 of said complaint.

13. Make no answer to the allegations contained and set forth in paragraph 13 of said complaint.

14. Deny the allegations contained and set forth in paragraph 14 of said complaint.

15. Admit the allegations contained and set forth in paragraph 15 of said complaint.

16. Deny that these answering defendants, or any of them, failed or neglected to exert efforts to settle the labor dispute with said Local 18, or failed or neglected to prevent the collective bargaining process from reaching a state of impasse and stalemate; and allege that, in so far as there was a failure to settle said dispute, and, in so far as there was for a time an impasse and stalemate, the same were due to said Local and said defendants St. John, Walczak and Lansing.

[fol. 164] Wherefore, these defendants pray judgment dismissing said complaint as to them.

Miller, Mack & Fairchild, Attorneys for Defendants.

Milwaukee Gas Light Company, Glenn R. Chamberlain, B. T. Franck and P. J. Imse.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

ORDER TO SHOW CAUSE—October 10, 1949

Proof of Service 67 to 85.

On reading and filing the petition of the Wisconsin Employment Relations Board and upon the order filed herein on the 5th day of October, 1949.

It Is Ordered that The United Gas, Coke and Chemical Workers of America, District No. 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Chester Walczak, [fol. 165] Thomas Lansing, Peter Lupo, Charles Nutting, Al Helf, Cy Hackert, Ray Jonas, Charles Bauer, Al Smidoch, Peter Shank, Dan Burns, Al Fuhrman, Joe Seborn, Dan Kabosky, Joe Marquardt, Fred Stockfish and each of them appear before the above named court in the Court House at the City of Milwaukee, Wisconsin, on the 24th day of October, 1949, at the hour of 10 o'clock in the forenoon of said day or as soon thereafter as counsel may be heard and show or cause to the calendar assignment judge of the Circuit Court, if any there be, why they should not be punished as and for a civil contempt in failing to obey and in disobeying the order of this court issued on the 5th day of October, 1949, as described in the petition of the Wisconsin Employment Relations Board herein, and why this court should not grant the relief prayed for in said petition.

It Is Further Ordered that this order and a copy of the petition of the Wisconsin Employment Relations Board be served upon The United Gas, Coke and Chemical Workers of America, District No. 7, Local Union 18 and upon the officers and members named in the preceding paragraph, at least seven days before the time herein fixed for said hearing.

Dated at Milwaukee, Wisconsin, this 10th day of October, 1949.

By the Court, (S.) Otto H. Breidenbach, Circuit Judge.

[fol. 166] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

PETITION FOR ORDER TO SHOW CAUSE

The petition of the Wisconsin Employment Relations Board, the plaintiff in the above entitled action, by Thomas E. Fairchild, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, respectfully reports and shows:

[fol. 167] 1. That on the 5th day of October, 1949 order was entered in the above entitled action by the Circuit Court of Milwaukee County, Honorable Otto H. Breidenbach, Circuit Judge, Branch No. 1, presiding, requiring The United Gas, Coke and Chemical Workers of America, District No. 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Chester Walczak and Thomas Lansing:

(a) To desist and refrain from calling a strike or causing any work stoppage or slowdown which would cause interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from *instigating, inducing, conspiring with or encouraging any strike*, slowdown or work stoppage which would cause interruption of such service, and from picketing or causing to be picketed the premises of the Milwaukee Solvay Coke Company.

(b) To take immediate steps to notify all employees called out on strike to resume service forthwith.

2. That true and correct copies of said order were duly and presently served upon all of the defendants above

named on the 5th day of October, 1949, as more fully appears by the proof of service on file in the above entitled action; that at or about one o'clock in the afternoon of said day said order was duly served upon and read to the members of the defendant, The United Gas, Coke and Chemical Workers of America, District No. 7, Local Union 18 in meeting assembled in the City of Milwaukee; and that at or about 3 o'clock in the afternoon of said day the order was duly served upon and read to members of said Local Union [fol. 168] 18 assembled in a picket line at the premises of the Milwaukee Solvay Coke Company, Milwaukee.

3. That Arthur St. John, Chester Walczak and Thomas Lansing are officers, and the following named persons are members, of the defendant, The United Gas, Coke and Chemical Workers of America, District No. 7, Local Union 18, affiliated with the C. I. O.: Peter Lupo, Charles Nutting, Al Helf, Cy Hackert, Ray Jonas, Charles Bauer, Al Smidoch, Peter Shank, Dan Burns, Al Fuhrman, Joe Seborn, Dan Kabosky, Joe Marquardt, Fred Stockfish.

4. On information and belief, that the defendant, The United Gas, Coke and Chemical Workers of America, District No. 7, Local Union 18, and the officers and members thereof named in the preceding paragraph have each of them wholly failed and neglected to conform to the provisions of the order described in paragraph 1 hereof; that they and each of them have failed, refused and neglected to cease and desist from the activities and conduct described in subparagraph (a) of paragraph 1 hereof; and that they and each of them have wholly failed and neglected to take steps to notify employees called out on strike to resume service forthwith as provided in subparagraph (b) of paragraph 1 hereof; that, on the contrary, on the 5th and 6th days of October, 1949, after the service of the order described in paragraph 1 hereof, they and each of them have instigated, induced, conspired with and encouraged a strike, slowdown and work stoppage to cause interruption of the [fol. 169] service of the Milwaukee Gas Light Company and the Milwaukee Solvay Coke Company and have picketed and caused to be picketed the premises of the Milwaukee Solvay Coke Company, in the City of Milwaukee, Milwaukee County, Wisconsin.

5. That the acts and omissions of The United Gas, Coke and Chemical Workers of America, District No. 7, Local Union 18, affiliated with the C. I. O. and of the officers and

members named in paragraph 2 hereof, and of each of them, were calculated to, and do, in fact, defeat and impair the rights of the plaintiff herein; that said plaintiff is charged by the law of the State of Wisconsin with the duty of preventing such acts and omissions in the interest of the public.

6. That no previous application has been made for the punishment of the said defendant, The United Gas, Coke and Chemical Workers of America, District No. 7, Local Union 18, and the officers and members thereof named in paragraph 3, or any of them.

Wherefore your plaintiff prays that an order to show cause may be issued out of this court directed to the defendant, The United Gas, Coke and Chemical Workers of America, District No. 7, Local Union 18 and to the officers and members thereof named in paragraph 3 hereof, and to each of them, requiring them and each of them to appear at a time and place to be fixed by this court and then and there to show cause to this court why they and each of them should not be punished for said civil contempt and why your plaintiff herein should not recover its costs and expenses, and why [fol. 170] the court should not make such other orders and give such other relief as may be just and proper in the premises.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

DEFENDANTS

Proposed Findings of Fact and Conclusions of Law

The order of this court, requiring the United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Thomas Lansing, Alvin Fuhrman, Peter Lupo, Charles Nutting, Al Helf, Cy Hackert, Ray Jonas, Charles Bauer, Al Snidoch, Peter Shank, Dan Burns, Joe Seborn, Dan Kabosky, Joe Marquardt, Fred Stockfish, and Chester Walezak, to show cause why they and each of them should not be punished for a civil contempt in failing to obey and disobeying the order of this court issued on the 5th day of October, 1949, having come on to be heard on the 16th and 17th days of January, 1950, before the Circuit Court of Milwaukee County, Branch No. 1, Honorable Otto H. Breidenbach presiding, and the

petitioner appearing by Thomas E. Fairchild, Attorney General, and Beatrice Lampert, Assistant Attorney General, and the respondents appearing by Max Raskin and William Quick, and the court having heard the evidence and being fully advised in the premises, does hereby make the following findings of fact and conclusions of law:

[fol. 171]

FINDINGS OF FACT

1. That the order of this court issued in this proceeding on October 5th, 1949, was duly served upon the respondents, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, and Arthur St. John, except that Thomas Lansing and Alvin Fuhrman were not personally served, at about 2:00 o'clock in the afternoon on Wednesday, October 5th, during an assemblage of members of said Local 18 at Bohemian Hall in the city of Milwaukee, Milwaukee County, Wisconsin; and that the respondent, Thomas Lansing, had notice that an order had been issued at about 3:00 o'clock in the afternoon of said day.

2. That said order commanded that the respondents, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Chester Walczak and Thomas Lansing to absolutely desist and refrain from calling a strike, going out on strike, or causing any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service, and from picketing or causing to be picketed the premises of the Milwaukee Solvay Coke Company.

It is further ordered that until the hearing of said order to show cause the defendants, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, [fol. 172] affiliated with the C. I. O., Arthur St. John, Chester Walczak and Thomas Lansing, take immediate steps to notify all employees called out on strike to resume service forthwith.

3. The Milwaukee Gas Light Company is a Wisconsin corporation engaged in the business of furnishing light, heat, and gas to the public in Milwaukee County, Wisconsin.

4. The common stock of the Milwaukee Solvay Coke Com-

pany, a Wisconsin corporation, is wholly owned by the Milwaukee Gas Light Company; that at all the times involved in this proceeding, said Milwaukee Solvay Coke Company was engaged in the business of manufacturing gas which said product was used exclusively by the Milwaukee Gas Light Company; that said Milwaukee Solvay Coke Company supplied during October, 1949, 55 to 60 per cent of the gas distributed to the public by the Milwaukee Gas Light Company and at other times has supplied from 50 to 80 per cent of the base load of gas distributed by said Milwaukee Gas Light Company.

5. That a strike was voted by the employees of the Milwaukee Gas Light Company and that the date and hour for the commencement of the strike was fixed by the Bargaining Committee of Local 18 for 6:00 o'clock A. M. October 5th, 1949. That the bargaining committee is composed of nine members and that the respondents Arthur St. John, Thomas Lansing and Alvin Fuhrman are members of such committee. That the strike was continued after service of the order described in paragraphs or Findings 1 and 2; that none of [fol. 173] the respondents United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lansing, and Alvin C. Fuhrman took any steps to notify any of the employees called out on strike to resume service until about 8 o'clock on the morning of October 6th, at which time said respondents notified the employees that a settlement of the labor dispute between Local 18 and the Milwaukee Gas Light Company had been reached, that the strike had been won, and that employees should return to work.

6. That the respondents, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lansing, Alvin Fuhrman, and each of them, disobeyed and failed to obey the order of this court entered October 5th, 1949, by failing and neglecting to take steps to notify employees of the gas company called out on strike to resume service forthwith.

7. That said acts and conduct were calculated to, and actually did, defeat, impede and prejudice the rights and remedies of the Wisconsin Employment Relations Board, a party in said action, which is charged by statute with the duty to prevent violations of subchapter III of chapter 111, Wis. Stats.

8. That the evidence does not sufficiently and clearly establish the knowledge of the other respondents above named of the scope and requirement of the court's order issued October 5th, 1949.

[fol. 174]

CONCLUSIONS OF LAW

That the United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lausing and Alvin C. Fuhrman are, and each of them is, guilty of wilful and contumacious civil contempt.

That the evidence does not sufficiently and clearly establish wilful and contumacious civil contempt as to the other respondents above named.

Dated — —, 1950.

By the Court, Circuit Judge.

[fol. 175] IN CIRCUIT COURT OF MILWAUKEE COUNTY

• [Title omitted]

DEFENDANT'S PROPOSED JUDGMENT

The order of this court requiring the United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Alvin C. Fuhrman, Thomas Lansing, Peter Lupó, Charles Nutting, Al Helf, Cy Hackert, Ray Jonas, Charles Bauer, Al Snidoch, Peter Shank, Dan Burns, Joe Seborn, Dan Kabosky, Joe Marquardt, Fred Stockfish, and Chester Walczak to show [fol. 176] cause why they and each of them should not be punished as for a civil contempt in failing to obey and disobeying the order of this court issued on the 5th day of October, 1949, coming on to be heard on the 16th and 17th day of January, 1950, before the Circuit Court of Milwaukee County, Branch No. 1, Honorable Otto H. Breidenbach presiding, and the petitioner appearing by Thomas E. Fairchild, Attorney General, and Beatrice Lampert, Assistant Attorney General, and the respondents appearing by Max Raskin and William Quick, and the court having heard the evidence and being fully advised in the premises, and having made and filed its findings of fact and conclusions of law pursuant to said decision.

Now, upon motion of Thomas E. Fairchild, Attorney General, and upon all the records, files and proceedings herein,

1. It is Adjudged and Decreed that United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lansing and Alvin C. Fuhrman are, and each of them is, guilty of civil contempt for having disobeyed and in failing to obey the order made by the court in this action on the 5th day of October, 1949.

2. That as punishment for said contempt the United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lansing and Alvin C. Fuhrman, and each of them, shall pay a fine in the sum of Two Hundred Fifty Dollars (\$250.00).

[fol. 177] 3. That as to the respondents, Chester Waleczak, Peter Lupo, Charles Nutting, Al Helf, Cy Hackert, Ray Jonas, Charles Bauer, Al Snidoch, Peter Shank, Dan Burns, Joe Seborn, Dan Kabosky, Joe Marquardt, Fred Stockfish, the petition of the Wisconsin Employment Relations Board to punish for civil contempt be and it is hereby dismissed. Dated —, 1950.

By the Court, Circuit Judge.

TESTIMONY

ALVIN C. FUHRMAN called as an adverse witness by the plaintiff:

I live at 6308 West Beloit Road, West Allis and am employed by the Milwaukee Gas Light Company. I was so employed in the first week in October, 1949, as an excavating machine operator. My normal working hours during the first week of October were from 8:00 A. M. to 4:30 P. M. I am an officer of Local 18, Gas, Coke and Chemical Workers of America, District 7. I am Vice President, a member of the executive board and of the negotiating committee.

[fol. 178] The membership of the union authorized the executive board to call a strike. The membership was in such a turmoil because of our slow negotiations with the company that they demanded that a strike be held or pulled. The negotiating committee had been dealing with the Gas

Company for a new contract since the previous April. On or about October 5th the negotiation committee felt there was a demand by the membership for a strike. The strike was ordered by the negotiating committee as per the membership request or orders, on October 5th.

There was a reason other than the possible strike action why I personally would not have gone to work on October 5th. I might say that during the course of that week and the previous week, I had been in constant negotiations either with the company or our attorneys as to the federal case. It was very probable I might not have gone to work the next day, if we had other business to take care of.

Other than my duty to negotiate as a member of the negotiating committee, and other than strike action, there was no other reason, such as illness or layoff, why I should not have gone to work at the Gas Company on October 5th.

On the morning of October 5th, 1949, representatives of the negotiating committee advised union members when they came to work that a strike had been set for that date, and they were advised that Bohemian Hall would be the headquarters for the strike. They were not told that there would be a meeting there of the workers that afternoon. I did not attend a meeting at the Bohemian Hall at 1:15 that [fol. 179] afternoon. I was not present at the Bohemian Hall that day.

I would not say I organized or captained any pickets. I was picketing as well as a number of other members. I might say because I probably was the top-ranking officer down there at the time, the police department contacted me as such and told me certain orders that had come from their district as to the number of pickets, the way they wanted them to picket, and so forth. I relayed it to the men and asked them to obey the orders of the police department.

I would say that one of the issues that the negotiating committee had discussed and suggested was that a picket line be set up before the premises of the Milwaukee Solvay Coke Company. I think any number of them went down there the morning of the strike themselves after the first shift of the Coke Company had come to work.

I did not see any deputy sheriff come to the picket line at the Milwaukee Solvay Coke Company and attempt to serve an order. It is very probable that I was on the picket

line at 1:30 o'clock in the afternoon, but we had three picket lines or three lines of men around there. I might have been at any one of them. There were three groups going at the same time at the Coke Company premises. These pickets were entirely or principally members of the union and employees of the Gas Company.

I think the Milwaukee Gas Light Company in that period had facilities to manufacture enough gas to supply the City of Milwaukee with if they deemed it necessary. They had [fol. 180] been using Coke Company gas. A substantial portion of their supply would be shut off if the Coke Company stopped producing gas.

Q. There is no question but what if the Coke Company operations could be stopped, it would have an effect—some effect upon the ability of the Gas Company to continue its gas service to the public in Milwaukee?

A. No, I don't think so, even if the Coke Company could have supplied all the gas necessary, because the maintenance and production structure of the Gas Company was not operating and that would have been the main factor in the Consumers not getting the proper amount of gas. The Coke Company doesn't have the pumps, and so forth, to push the gas through the mains.

Q. Normally, the Coke Company does supply a large proportion of the gas used by the Gas Company, up until the conversion to natural gas, is that right?

A. At that time, natural gas was in the process of being sent into a number of areas, probably a big share of the areas at that time, so I think the Coke Company product wasn't too important a factor at that.

Q. But it was a substantial factor, was it not?

A. I don't know.

Q. The general understanding was that it was important to the success of the strike to have a picket line at the Coke Company, is that right?

A. I don't think so, no, sir.

Q. But it was one of the activities of the strike which was agreed upon by the negotiating committee?

[fol. 181] A. I wouldn't say that. I don't think it was agreed upon definitely that the Coke Company would be picketed to the extent we would ask them to shut down.

Q. Was there some reason for putting a picket line at the Coke Company?

A. Naturally, we figured they were part of the Milwaukee Gas Light Company setup in this city.

It was probably felt that members of other unions who were employed at the Coke Company would be less likely to go to work if we had a picket line before the Coke Company, although we stopped nobody from going to work.

If I were to see a picket line I wouldn't pass it. That might be the opinion of the Coke Company members.

I learned directly that an order had been issued by the Circuit Court of Milwaukee County, ordering the union and some named individuals to desist and refrain from calling a strike and to desist and refrain from instigating, inducing, conspiring with or encouraging any strike, about 10:30 the night of the strike from Mrs. Lampert. I was in the picket line at the Coke Company when I learned it.

That was an unusual circumstance. I had been in Judge Tehan's office negotiating with the Mayor and Judge Tehan. I was requested to go to the Mayor's office at the City Hall. From there they asked me to come down to the picket line. I met Mrs. Lampert, and she told me of the order requiring the men to go back to work, the officers of the union should [fol. 182] order them to do that, and so forth, but I wasn't actually on the picket line. I had been down there because of the fact some solvay men refused to walk through our picket line. They asked me to come down to see if relief couldn't be given to those fellows by talking to the men and telling them to go in and maintain their plant.

I left the picket line around 3:00 or 3:30 in the afternoon, and went into the negotiating group. I didn't meet any of the members who had been present at the meeting. I met a couple of other ones.

Q. Was any reference made of the issuance of the order by the Circuit Court?

A. I believe there was, yes, sir.

Q. At the meeting of the negotiating committee?

A. There was no meeting of the negotiating committee, only a couple members of the committee plus perhaps a few other members of the union, general members of the union.

Q. At about what time was that?

A. I'd say late in the afternoon.

The Court: Of October 5th?

A. Yes, sir.

Q. You understand at that time that an order had been issued by the Circuit Court forbidding the strike, is that right?

A. No, sir.

Q. What did you understand about the order?

The Court: Suppose you ask him when he became aware of the fact there was an order issued, what the source of his information was.

[fol. 183] By the Court:

Q. How did you first learn there was a court order, Mr. Fuhrman?

I wouldn't say I learned definitely there was a court order requiring the men to go back to work and things of such nature. The issue was so mixed up by the fellows that came down and who evidently didn't understand what the order was that was read off to them, any number of them. I don't think I could form an opinion as to what it was. First I learned of it I understood any number of things, Art. St. John and Chester Walczak got pinched, and that stuff. I heard that, I would say, previous to 3:30 at the Milwaukee Solvay Coke Company plant from fellows coming down evidently from the meeting.

I believe somebody told me a deputy sheriff had tried to read off something down there but nobody listened to him. I didn't make any attempt after that to find out what order might have been issued.

Q. Then it is your testimony your first complete knowledge of what was in that order and its effect came about 10:30 at night when Mrs. Lampert talked to you at the Coke Company premises?

A. I am in error there. It was probably 7:00 o'clock in Judge Tehan's chambers.

Q. From whom did you learn it there?

A. Mayor Zeidler and Judge Tehan.

Q. And after 7:00 o'clock in Judge Tehan's chambers you continued for several hours participating in negotiations toward settlement of the strike, is that right?

A. All night.

[fol. 184] After several hours I went down to the Coke Company again because the personnel man of the Coke Company had called the Mayor's office and said that Solvay Coke Company would not walk through our picket line. He said the maintenance men in the plant were tired out and couldn't shut the plant down or didn't want to or perhaps wouldn't be responsible. We didn't want that. I don't think anybody would. The Mayor asked why had been down to the picket line during the day and had contacted any of the fellows. I think I was picked out as one. I went down to the Mayor's office with the secretary, I believe Stanley Budny. We tried to contact the Coke Company to see what was wrong over there. That was practically impossible; the telephone lines were jammed up. I drove over there. It was there that the situation was explained to me, and I told them, any number of them, if they wanted to go in there we had no objection to walking through the picket line. I think I talked to the business agent of the union. He said they didn't want to be scabs and walk through it. I said probably this situation is different, we don't want the plant shut down and fall to pieces either. He said if it is agreeable to you. I said we haven't stopped any of your men from going through. I understand they took in a number of men, and Mrs. Lampert was to have made the statement we couldn't stop any of them. We didn't stop any of them, and we didn't try.

We had an understanding with the representative of the workers at the Coke Company that we had no objection if their men went in for the purposes of maintenance only. [fol. 185] Maintenance of that plant as it stood at that night included operation of the plant to a certain extent. You couldn't let the plant shut down without making gas. It had to go someplace or into the mains or I think Mr. Brill was the man I talked to that night at the Coke Company, Wednesday evening.

Q. Did you tell him you would be willing to let the men in to maintain the plant as long as no gas was sent to the Gas Company?

A. In the afternoon, no. In the evening, perhaps I did. I correct myself on that. I said it was our intention that gas would not be made to the point of full production, but it must be kept in the mains, and we wanted that, because that

would be an expensive item to the Gas Company, and it would come out of my pocket in the end or the consumers' pocket. You can't leave the gas out of the mains and start up again.

We were willing to maintain some production, but not complete production. After 10:30 or thereabouts, I spoke to Mrs. Lampert and went back again and stayed the rest of the night, or most of it, in Judge Tehan's chambers in connection with negotiations.

Q. At that time, was it your understanding that unless a negotiated settlement was reached your men would not go back to work in the morning?

A. I wouldn't say that. I told the men to go home that night after Mrs. Lampert talked to me. What they did the next day was their own business. I didn't order them to come back there or go back to work.

[fol. 186] It was not my understanding that unless a negotiated settlement was reached during that night that the men would not go back to work the next morning. As to my personal intention, that depended upon the outcome of the negotiations in the Judge's chambers. Personally I might not have gone back to work if a negotiated settlement had not been reached.

I do not remember if I made a statement to Mrs. Lampert that the reason for maintaining the line was to give notice to the employees of the Coke Company so that they would not go to work. Very possibly I might have. I asked the pickets to leave after Mrs. Lampert talked to me. I wouldn't say I had been advised officially that the Coke Company people would not go into the plant anyhow even if we did leave. Any number of employees told me they would not go to work. That didn't mean their leaders had advised me to that effect. Some of the people around the premises had told me that they wouldn't go in even if the Gas Company workers withdrew the picket line.

The strike was settled by agreement some time in the early morning hours of October 6th.

Q. Now, after you knew of the order of the Circuit Court, do you believe that you obeyed it?

A. That is a pretty hard question to answer.

Q. Did you do anything with respect to getting the people back to work or trying to get the strike terminated in accordance with the court's order?

A. It wouldn't have done any good that night any more, I doubt it, there were very few men who were to go back [fol. 187] to work at that hour.

Q. Is it your claim here that you did not violate the court order after you heard about it, is that the substance of your claim?

A. Individually I don't believe I did.

Q. And your explanation then for any failure on your part to obey it was simply any such action took place prior to the time you knew about the court order, is that right?

A. Would you repeat that, please?

*Mr. Fairchild: Perhaps I could simplify it.

Q. That any violation of the court order that you personally took part in, you claim that happened before you knew about the court order?

A. I believe that's right, yes, sir.

I would not say there was any person who was recognized as being in charge of the picket line. Probably because I was the highest member of the union down there, I was contacted more frequently as to a number of things than anybody else, and I believe some of the other members of the executive board, and so forth, who were down there were contacted at times too, but perhaps not as frequently as myself. There was no one we would call the captain of the line or anything of that sort.

As I say, when the police department did have an order and seen me around, they came to me. I know a member of the Gas Light Company and member of the union by the name of Joe Saborn. I believe he was on the picket line. [fol. 188] I do not recollect hearing Saborn announce to everybody, at least in a voice loud enough for the people to hear around there, that the coke workers had guaranteed not to go into the plant if our line was disbanded.

I know Pete Lupo by sight, not personally. He was on the picket line. I don't know whether he was there until the line disbanded. I don't know Charles Nutting. I know who he was, but if I said I picked him out there, I would be a liar. Al Helf was probably there I think. I don't know whether he was there in the evening.

I don't know Cy Hackert, or Ray Jonas. Charles Bauer was there at the time I was there in the afternoon, but not in the evening. I had seen Al Sniadach during the course of

the day. I don't know Peter Schank very well. I think Dan Burns was down there, yes, sir. I believe Saborn was there in the evening and was there in the afternoon also. I don't recall seeing Dan Kaboskey, or Joe Marquardt or Fred Stockfish,

HENRY C. RULE, called as a witness by the plaintiff:

My name is Henry C. Rule and I am a member of the Wisconsin Employment Relations Board, and was such member on October 4th, 5th and 6th, 1949.

Examination.

By Mrs. Lampert:

Q. I believe that you testified Mr. Fuhrman—first, I think you testified that the man you pointed out in Exhibit 4 had [fol. 189] a conversation with some Coke Company employees, then came back to the picket line and said they could go home, the coke workers wouldn't go in anyhow?

A. That's correct.

Q. Was Fuhrman's statement about disbanding the line before or after that occurred?

A. His statement about disbanding the line was—he made that statement to the coke workers and also the pickets themselves.

Q. You testified Mr. Fuhrman said they would have to disband the line or do you mean Mr. Saborn?

A. Mr. Fuhrman. My testimony is Mr. Fuhrman told the pickets they would have to disband.

Q. When did he tell them that, before or after this episode you testified about relating to the man in the plaid coat who talked to the coke workers?

A. Before.

Raymond Hunholz, testimony not material.

Foster Stanfield, testimony not material.

Alphonse Thomas Sniadach, testimony not material.

John William Ahlhauser, testimony not material.

Daniel A. Burns, testimony not material.

Robert J. Riordan, testimony not material.

[fol. 190] Peter Schank, testimony not material.

Daniel Kaboskey, testimony not material.

Joseph F. Marquardt, testimony not material.

Fred Stockfish, testimony not material.

Alfred Helf, testimony not material.

Joseph Saborn, testimony not material.

Chester Walczak, testimony not material.

Thomas Lansing, called as a witness adversely by the plaintiff:

My name is Thomas Lansing and I live at 2779 South Superior Street, Milwaukee. I am employed by the Milwaukee Gas Light Company in the capacity of an industrial gas fitter, and was so employed the first week in October, 1949.

I am a member of Local 18, but not an officer. I am a member of the bargaining committee, but not a member of the executive committee.

During the period from April to September, 1949, the bargaining committee carried on negotiations with the representatives of the Gas Company for a new contract. The membership of the local authorized the calling of a strike on several occasions. That authorization was given about four times in September, 1949, and that authority was given to the bargaining committee.

On October 4th, the bargaining committee, by vote, decided to call a strike. All of the people on the bargaining [fol. 191] committee might not have wanted to strike, but there was a vote by a majority carried. I was present at that meeting. Those bargaining committee members associated with a certain department were given the job to take care of their certain department as to picketing. I personally did recruit some group of pickets and picket signs.

I was at the meeting in the Bohemian Hall the next afternoon part of the time. I was not present when the deputy sheriff served the papers on Mr. St. John and Mr. Walczak. I learned that he had served some papers on them about an hour later through a telephone call. I don't remember who told me. I think it was Mr. Fuhrman. That would be about 3:00 o'clock in the afternoon. In reference to the strike I went from picket line to picket line and met with the people on the lines and my purpose was to give them moral support or something like that. I did not tell them an injunction had been served. That matter was not discussed at any time when I approached the pickets.

I was present at the negotiations in Judge Tehan's office and spent the night in those negotiations. Up until the time that the settlement was reached as a result of those negotiations on the morning of October 6th, I made no attempt to call off the strike or to call the workers back to work. The picket lines that I visited included the one at the Coke Company plant. At the time I was there no deputy sheriff was at that place.

When I was in Judge Tehan's chambers, then I heard from one of our bargaining committee members that some [fol. 192] papers had been served. That was some time later and I want to get this picture clear, if I may. That at no time was I ever served with any papers or did I see any papers served. All I had was hearsay as to the servicing of papers on this group and that group. That's all. I did understand, however, that a Circuit Court order had been served on some other individuals, and that the order forbid the picketing at the Coke Company by our union.

Q. Do you have any explanation that you want to make to the court as to why, after you heard about the issuance of the Circuit Court order, you continued to encourage picketing and did nothing to recall the people back to work?

A. I would welcome the opportunity, Mr. Fairchild. Appreciate from the expiration of our contract—not from the expiration but from the reopening of our contract—April passed, May passed, June passed, July passed, August passed, it came into September. We met with the company, who were in a position through the use of a law, which I believe is vicious, to stall and delay negotiations, necessitating the use of attorneys and costing our local union much money; when, in talking to management, the vice-president who dealt with us would laugh at our requests. Personally, I became discouraged, and I do believe other members of the bargaining committee did, too. I do believe if the company would have been at least tactful that a strike never would have occurred at the Milwaukee Gas Light Company. All these things infiltrating into the people of our union, and feeling that they would gain nothing through peaceful collective bargaining, gradually the bargaining committee was [fol. 193] urged and pushed into a position where they had no recourse but to lead the people who were very willing into a strike situation. These things grow and develop and gets into a snowball and gets big and sometimes outgrows

the people who lead it. I think that is what happened with our local union. I do believe today if the same situation again happened where a company refused to bargain collectively on issues such as pensions, which they promised for years, that again the same strike situation would arise. People who work for labor and are interested in labor don't like to break laws, but sometimes these companies force you into a position where you must to save what you have left of your reputation. That's all I wish to say.

Q. Did you, after learning of the order of the court, state to some representative of the C. I. O. News the statement which I will read or anything of like substance or character: "We expected to be arrested for violating the injunction, and we were prepared for it. We do not have a 1-man union, and our members knew what to do if the first line, then the second and the third was hauled into jail."

A. I didn't make that statement to a member of the C. I. O. News. I made that statement to our people at the union meeting.

Q. When was that meeting?

A. Some time prior to the—I am not too sure whether it was just prior to the strike or the night of the strike vote. That statement may sound like ours is a communistically inclined union—I don't like that language—but it isn't; I assure you of that.

Q. Was the quote I read to you substantially what you said?

[fol. 194] A. Substantially what I said to our people at the union meeting in an address I made to the membership.

Q. Was that before or after the strike occurred?

A. I believe it was prior to the strike. I am not too certain about that, Mr. Fairchild.

Q. I call your attention to the part of it that said: "We expect to be arrested for violating the injunction," and I just raise the question whether you believe that you said that before the strike and before the injunction was issued?

A. I don't know whether I mentioned in my talk to the people about an injunction. It is evident then that I made that statement to them—it couldn't be because I didn't talk to these people after the strike was called. It must be prior to that, and at that time there was no injunction. Mr. Fairchild, I previously testified that I left that meeting prior to the—or just at the time of the entry of the deputy sheriff

who eventually served the papers. That was the meeting after the strike was in effect, and I made no talk at that meeting.

By the Court:

Q. Mr. Lansing, the talk to which your attention was just called you say was made prior to October 5th to the members?

A. Yes, your Honor. Whether this quote is right about this injunction, that I don't remember. On the face of it, it would seem there was no injunction at the time, and I certainly couldn't talk about something that was not there. [fol. 195] Q. Do you recall what time you made that statement or substantially that statement?

A. Very shortly prior to the calling of the strike.

Q. That would be before October 4th?

A. Yes.

Direct examination.

By Mr. Raskin:

I have been a member of Local 18 at the Gas Company since 1936 or 1937. I was a member of the American Federation of Labor while working for the Milwaukee Gas Light Company. I have been a member of District 50 associated with the United Mine Workers of America. There was a change and I became a member of the United Gas, Coke and Chemical Workers, CIO. I have been working continuously for the Gas Company 17 years, and approximately 23 years in all with prior service record. I am married and have a family.

The previous year I was president of the local union. Two years prior to that I was also president of the local union, and I have also been vice-president of the local union prior to that. I have taken an active interest in the affairs of the union since I have been a member of it. It was a part of my life. I was very much interested in the union.

I have been a participant in the negotiations between the company and the union. The union had a contract with the company since 1937 and the last one expired June 1st, 1949. We had a reopening date that if we wished to change the

contract, we had 60 days to file notice. That was done. The negotiations had been entered into between the company [fol. 196] and the union with respect to a new contract after June 1, 1949, some time in April, 1949, and notice was given to the Federal Mediation and Conciliation Service. We met with the Conciliation Service. I would say there were some thirty odd meetings between April 1st, 1949, and October 5th, 1949.

There was no substantial progress made as to money, nothing. These things were contingent upon settlement of the contract—extended vacations, that was about all; progress was virtually nil. On September 16th, 1949, a point was reached in the negotiations where the company refused to engage in bona fide collective bargaining altogether, as a result of which it was necessary to file a charge with the National Labor Relations Board, and the union did so.

Those charges are still pending before the National Labor Relations Board. About September 16th, 1949, the State Employment Relations Board sent Mr. John Roe, a conciliator. Mr. Roe and the union and the company met on a few occasions to try to settle the differences between the parties. He acted as a mediator. The union requested Mr. Chamberlain, the president of the company, and the people in responsible positions, to sit in. We felt the company was sending errand boys to do a man's job.

Mr. Chamberlain never sat in on these negotiations, except on one occasion he invited us to a dinner, and at the dinner he suggested we sign the contract and hurry it up and everything would be all right. Of course, that wasn't [fol. 197] negotiating. He invited us to dinner and thought we would sign the contract.

Mr. Imse never did sit in on the negotiations. We urged Mr. Roe to request Mr. Chamberlain to take part in the negotiations, and it was my understanding that Mr. Roe did so. The union was certified by the National Labor Relations Board as the certified bargaining agent on June 24th, 1943.

My work has no relation to the production or manufacture of gas. It has some slight relation to transmission in the places I would ordinarily work in the building proper. My absence from work would not in any wise affect the service of gas to the constituents of Milwaukee County.

I was engaged in union affairs the week of October 3rd, 1949. I recall being in negotiations on Monday and on Tues-

day, and then in the Federal District Court chambers that afternoon. We were in negotiations on Wednesday, October 5th, from the late afternoon, until about 9:30 the following morning. I had no sleep. I think we were sold short because I didn't have enough sleep. I was not in any condition to go to work on October 6th. I returned to work the following day, October 7th, Friday.

In my experience as a responsible official of the local, I could tell from the actions and tenor of the people, no matter what you done, the spirit was there; the discouragement was there, and the desire to strike was there; you couldn't stop it. It was made so evident on the day following the conclusion of reaching an agreement between the [fol. 198] committee and the company. When I went to my own people on the picket line, and I asked them to go back to work, and it was raining, and the people were soaking wet, and it was cold, and they wouldn't leave the picket line; they wouldn't even believe me that the strike was over. So I am sure that no matter what any officer would have done, that there was no stopping the rolling of the snowball.

The only effective way to get these people back to work was a meeting of minds between management and the union as to a settlement of contract. That was the only recourse. I don't believe the company took any initiatory step to engage in collective bargaining on October 5th.

By Mr. Fairchild:

Q. Did you take any initiatory step on October 5th toward a settlement with the company?

A. Yes, I sat down with them and talked to them in the meeting.

Q. At the request and invitation of Mayor Zeidler and Judge Tehan?

A. Yes. Of course, we in the committee had urged a meeting with management. We thought that was the only way. You can't keep the people on the streets. You have to get together some time sooner or later; the sooner the better. I don't know whether St. John contacted the company to have a meeting, but I think it was urged that we do so.

I don't know whether anything was done specifically to call a meeting except what was done by Judge Tehan and Mayor Zeidler.

Albert P. Mueller, testimony not material.

[fol. 199] Alfred Brill, testimony not material.

John C. Golender, testimony not material.

Peter Lupo, testimony not material.

Charles George Nutting, testimony not material.

Cyrus C. Hackert, testimony not material. ☞

Ray Jonas, testimony not material.

Charles Bauer, testimony not material.

Arthur St. John, called adversely by the plaintiff:

My name is Arthur St. John and I was employed by the Milwaukee Gas Light Company in October, 1949, as a serviceman working out of the service department. My normal working hours were from 7:30 to 5:30. I am a member of the executive board, bargaining committee and the president of Local 18.

The testimony of Chester Waleczak as to negotiations carried on by the bargaining committee and as to all the events up to the time of the service of the order at Bohemian Hall is substantially correct. We told the people that the order—what it read, and requested them to go back to work, but at that time we realized that either a further request or a command would be of no avail because of the attitude, so at that time we suggested through our attorney to request the Mayor of Milwaukee to prevail on the company to bring them back into negotiations because we believed [fol. 200] that was the only way we would ever get them back to work and the quickest way.

We went down to the attorney's office, and he had contacted the Mayor's office. After that program had been set up, men were detailed to go out and get the rest of the bargaining committee. There were four or five. We went to the city hall, and the understanding was with those people detailed to get the rest of the bargaining committee that we would meet in the lobby and go into the Mayor's office in a group. Having waited there thirty or forty minutes, we went into the office and found out they didn't get there, so the Mayor at that time requested we be back about 7:00 o'clock. We left and went out to round up the members ourselves. In the course of that, we had contacted the attorney, and he had told us that the place had been changed, to meet in the chambers of the Federal Judge Robert Tehan. We then, after having a bite to eat, proceeded to the chambers of Judge Tehan where we spent the night in negotiating.

Q. I take it that at no time up until the time of the settlement did you make any further effort to notify the people to come back to work or off the picket line?

A. I think you can appreciate that was very—quite an ordeal of negotiating a contract or what we couldn't do in six months we negotiated in 13 hours, and it was quite a deal; it was a tough deal, after being up all day and night. We didn't have too much time to get out of there. In fact, we didn't think of it. Our concern was getting a contract and getting to the point where we could send the men back to work.

[fol. 201] Q. It is a fact, whatever the reason, that no attempt was made to send out such notice?

A. Appreciate this, that the officers of this CIO is not identical to AFL. The officers in this local don't have any power other than to recommend. The power to call a strike or approve a contract lies with the membership. The membership is the governing body of this local union. So although in essence we may have named the hour of the strike, they actually called it by their vote, and it is the same in sending them back to work; they must approve what we done to go back to work. After the negotiations of that morning, which was completed some time about 8:30, 9:00 o'clock, Mr. Walezak and myself went over to the attorney's office where an arrangement had been made with the Milwaukee Journal to make a recording by myself, stating that the fellows—the strike was ended, and the people should go back to work, and I believe also that we called a meeting in that same announcement for that night of the membership to approve or disapprove of the contract as we had accepted it. After that recording, after having a bite to eat, we then—Chester Walezak and myself—made a tour of all the plants and also the Coke Company; there were no pickets there, but there were some people around, mostly servicemen who reported to work on hearing the radio report, and they were sent home because of the fact they didn't need any servicemen. We inspected the plants; found all the boilers had been started; contacted the vice-president in charge of that operation and stated we were out there and seen that the pumps were manned and men there to do the work. That was immediately after 12:00 o'clock [fol. 202] or thereabouts. That evening we had a meeting,

as I stated, and the agreement as we accepted it was approved by the membership.

After the Bohemian Hall meeting, the first time we sent notices out to the people to come back to work was after the settlement. The union membership comprises both the people in the service department and the people who actually operate the pumps and engage in the manufacture and distribution of gas. Some of the actual production and distribution people, members of our union, did stay away from their work during the course of this strike. No doubt it is on record, although I wasn't there during the strike to see who was there. It would be only hearsay for me to say they stayed away.

I believe Exhibit 12 is the paper which the deputy sheriff read to me and of which he gave me a copy, at Bohemian Hall, except I do believe the name of Lawrence Gooding was in there and not Henry C. Rule. I don't believe Henry C. Rule was on there, if my memory serves me correctly. I don't recall that at all. I remember it was all printed, to my knowledge, that the name was Lawrence Gooding and not Henry C. Rule. The place I mean is where Henry C. Rule has been written in pen.

My average earnings are approximately \$65.00 per week.

Q. I believe you covered the explanation that you have as to why you took no additional action to comply with the court's order. Do you have any further explanation you want to make?

[fol. 203] A. I have none. That consumed all the time from the time that the deputy sheriff had served the papers until we got into negotiations. We were busy every minute. You appreciate it took some time to get to the attorney's office, to make contact with the Mayor, to agree to these things, to go out get the bargaining committee spread all over the city, and get something to eat, and get back in a matter of three, three and a half hours.

Examination by Mr. Raskin:

I am 49 years old and am married and have worked for the gas company for 25 years continuously. The work I performed in the early part of October had no relation to the production, transmission or manufacture of gas. I have belonged to this union since 1937. The company and the union had contracts from year to year since 1937. The last

one, prior to the one that had just recently been negotiated, expired on June 1, 1949. A 60 day notice of termination had been given by the union for the purpose of engaging in negotiations with the company to begin in April, 1949.

We had been in negotiations with the company from April, 1949, until the morning of October 6th, 1949. When we are engaged in negotiations as a representative of the union, we are free to absent ourselves from work with the company. We have engaged in continuous negotiations since September 16th, 1949, almost daily, until the contract was concluded on the morning of October 6th, and for that period of time I was free to absent myself from the work with the consent of the company.

[fol. 204] I was in Judge Tehan's chambers on Tuesday, October 4th. We were engaging in negotiations, on that day and the day before. The union had taken a number of votes with respect to securing an expression of opinion from the membership as to how they felt about going out on strike.

Q. Was it your opinion and the opinion of the bargaining committee and the membership that the company, by virtue of the statute that was on the books in Wisconsin, felt that the union would never go on strike and therefore could afford to be very nonchalant about their negotiations with the union?

A. I think in this respect that we admit the management met with the U. S. Conciliation several times. Although there were two commissioners there, they could not get the company to deviate from their way of negotiating. They didn't wish to negotiate on any article but one, and they would not hold that in abeyance and go to any other article. From that you could appreciate how tough it was to engage in collective bargaining. At the end of some time, the U. S. Conciliators threw up their hands and said, "We can't do no more." Later the state appointed a conciliator, who we recognized not as a conciliator but as a friend of labor, having met him before and knowing of his capacity and his prominence, and we accepted him as a friend to see if he couldn't get the company to negotiate in a good collective way.

This was Mr. John Roe. At the expiration of some two weeks, he threw up his hands and said, "They won't move," so we were up against a stone wall, and after making these

many reports, after some 40 odd meetings, the membership was more or less tired of hearing or spending money to send a committee up there and coming back with nothing, and I [fol. 205] think it left them in much despair and discouragement, and I think that was, well, the crux of the reason for the strike.

In the presence of John Roe, the conciliator—although we did not accept him as a conciliator, they sent him as such—we had informed the attorney and the company that were sitting in on the negotiating that we had taken three or four strike votes, and that I told them it was getting pretty tough; these people definitely demanded better negotiations or I was afraid we couldn't hold the men, the committee or nobody else. They reached that stage where they were ready to walk out. Mr. Swanson, the attorney for the Gas Company in the negotiations, made the statement, he said, "Your fellows wouldn't go on strike," he said "I don't think you would."

I recall the votes on the strike. One vote was I think 389 cast for and there was 15 noes, and 2 void. There was a voice vote taken of 536, which was unanimous. And later we took a vote, more or less on cafeteria style, we went to the different places and sealed the boxes and brought the votes into your office and had a reporter or two from the Sentinel come over and open those up and count them in their presence. That vote was almost I think 600 and something for, and 4 or 5 opposed to it.

I was at Bohemian Hall when the papers were served on me. The officer seemed pretty nervous, and you can't blame him for being that way, but he did make the statement, "I'm awful nervous," and I did ask him to slow up and take it easy, everything would be orderly, not to pay [fol. 206] too much attention to the shouting; as far as physically, he had no worry.

Q. Did he read the paper loud enough for others to hear him besides you and Chester Waleczak?

A. To be absolutely honest, I didn't even hear him read that audibly myself. At times I did. He didn't read it loud enough for me to hear.

I told the members who were present at Bohemian Hall that the order required them to go back to work. As I previously stated, from their attitude I realized further requests or further commands would not get them to go to

work, so what we thought was the best idea to get them back was to get back in negotiations and follow that trend, and which we were successful in doing later. I left Bohemian Hall about 2:30 or thereabouts.

I received a call just about that time to come to your office. That is the first place I went after leaving Bohemian Hall. I believe there was Walczak and myself, Sheehan and Cardinal. I believe that was the four that came. At that time we were told that arrangements had been made to meet in the Mayor's office. I detailed two fellows to go out and round up the rest of the bargaining committee. There are 9 members on the bargaining committee. We went over and waited about 30 minutes in the lobby of the city hall where I had said we would meet the rest of the committee. We waited there some 30 or 50 minutes, then went up into the Mayor's office and, well, it was then about 3:00 o'clock or close to it, so the Mayor—first, I told him I didn't have [fol. 207] a chance to get the rest of the bargaining committee together so I told him I would go out and get them. He said we should do that and be back at 7:00 o'clock.

When I came to your office you told me that after conferring with the Mayor he directed you to get us over at the city hall since he was also making a contact with the company or trying to. We did not confer with the Mayor at our first meeting that afternoon with him. We found that the plans were changed, and that we were to be at Judge Tehan's chambers at 7:00 o'clock that night.

The entire committee was there. We finally rounded them all up. Mayor Zeidler was also there, and the U. S. Conciliation Commissioner Murphy. Mr. Gooding appeared there at one time. I don't know how long he was there. The representatives of the company were in another room and Judge Tehan was sort of going from one place to another.

I believe it started out that way, although I didn't see them in another room, we understood they were there. Later I believe they went to the office, and negotiations were carried on by liaison between the Judge's chambers and the Gas Company office. The final agreement for the strike settlement was signed about 8:25 on the morning of Thursday, October 6th. We immediately came to your office and made arrangements for a broadcast to notify all of the Gas Company workers to return to work immediately and also to come to a meeting that night for ratification of the settlement.

Q. Would it have been of any particular practical or any effective value to spend the time that you spent in rounding [fol. 208] up your negotiating committee for the purpose of engaging in negotiations, to round up the negotiating committee for the purpose of informing them again about the court order and try to get them back to work?

A. I don't think that it would have been to any avail. As stated before, we wouldn't have the authority to command; we only have the authority to recommend their own approval, and realizing that policy of the CIO, we realized had we went in and got an acceptable agreement and present that agreement at a meeting, that would be the quickest and best way to get the men back to work.

Q. As a matter of fact, isn't it true even after the strike settlement, and after you had made the recording but before it was broadcast over the air, some of the pickets remained on the picket line, and it was necessary for you and Chester Walczak and even Judge Tehan, and I think Bill Quick, to make the rounds of the various picket lines?

A. Yes, we did. We definitely informed them the strike was over, that they should go back to work or go home, but definitely there was to be no more picket lines, to abolish all of them. We did that and made sure, stayed there until everybody was gone.

From Tuesday morning at 5:00 A. M. I did not get to bed until 3:00 o'clock Thursday. I was up again at 5:00, and in between that I answered a few phone calls. Then after that there was the meeting as arranged at Bohemian Hall at 8:00 o'clock; I presented the memorandum agreement as was accepted tentatively by the committee, and after much discussion it was voted on and accepted by the membership, and that was 11:00 o'clock or close to it.

[fol. 209] After I got up at 5:00 o'clock Tuesday morning, I went to bed about 1:00 o'clock Wednesday morning and the next time I went to bed was Thursday afternoon at 3:00 o'clock. When we were in Judge Tehan's chambers on Tuesday afternoon about 3:00 or 4:00 o'clock, Mr. Fitzgibbon of the Wisconsin Employment Relations Board was there. The judge had already signed an order to show cause and we were discussing the matter of when this order was to be heard. During the process of negotiations within the last few weeks we had received petitions from large numbers of members asking that a strike be called or to take some other action.

What we were unable to accomplish in bargaining and negotiations around the table from April until the morning of October 5th, you accomplished when you entered into the last phases of negotiations which took 13 hours, beginning at 7:00 o'clock, October 5th, and terminating at 8:30 the next morning.

Examination.

By Mr. Fairchild:

The conference in Judge Tehan's chambers on October 4th was with respect to the Federal action. We were asking for a decision on that enjoining the Wisconsin Employment Relations Board from injecting themselves in our negotiations.

The strike was not called by the bargaining committee. A strike was called by the membership, but the hour of the strike was set up by the bargaining committee, and was decided on at the meeting in the evening of October 4th, after [fol. 210] the meeting in Judge Tehan's chambers. The issue of whether or not there would be a strike was not discussed at the time of the meeting in Judge Tehan's chambers.

By the Court:

Q. Mr. St. John, will you state, as nearly as you can recall, just what you told the meeting at Bohemian Hall after the service of the papers?

A. There was a large amount of disorder. It was a mass meeting; it was no planned meeting. To further show it wasn't, we permitted everybody in there; there was photographers and reporters; and any of our regular meetings is restricted to members only. So it was more or less a mass meeting. There was no regular business carried on; no motions; no recording secretary; it was more or less of a place to assemble to find out what the feelings of the people were. I found that attitude was more or less on the bitter side, and to try in any way to—any ordinary way to get the people to go back to work—as stated before, I stated and so did the international representative state that the order requested them to resume work. Realizing it was of no avail to request or command the people at that time, we thought

the best thing was to force or prevail—have somebody with prominence prevail on the company to get back into negotiations, then by presenting even a partial agreement in a meeting, we could get them back to work. We thought that was the quickest, the best way and the surest way to get them back. After these many meetings and reporting nothing, no progress made, as I said before, the people were becoming discouraged. They thought it was just a matter of a pushing around the forgetting about the things that we wanted. One of the things that made this a tough negotiation, we had for some ten year- had stipulations of agreement that if and when there was an entry of natural gas, they would give us an adequate pension, and we felt that natural gas was in our mains, and the company should live up to their agreement because we have those stipulations signed by a former president, who is now dead, but we had that stipulation that they would do that on the entry of natural gas. Their tale for many years was that the manufactured gas business was not profitable because of the high cost of materials to make gas, but in natural gas there was a lot more profit, and when we got natural gas, we would get it, but we were stalemated on the issue of a pension. They offered us a pension we knew little or nothing about and had little or no confidence in because it was a Canadian company. We thought what we wanted—this was a pension plan that was specifically on 65 years of age—we felt that we would like to negotiate in a way to know how much money they were going to set up and, as we have agreed now, to request different plans, one embracing years of service, say 35 and 65 years of age, whichever occurs first. They told us before we move on to anything else, we are going to settle on this pension plan. We said we don't agree we want that pension plan. That took months. That was the crux of the conciliation; they couldn't get them to move out of that. We said to put the pension plan on the side and talk about a raise. They said no. That is the reason we have preferred an unfair labor practice charge against them, because they didn't bargain in good faith. In fact, the representative sent by the conciliation commission of the State, Mr. Roe, he didn't believe it was good collective bargaining—"Here, first you accept this before we talk about anything else"—and we [fol. 212] thought like many of the laborers, like one said

here today, it was a way of getting around the thing they said they would do for us, give us a pension on the entry of natural gas; and then create confusion and bitter feeling. We thought after patiently waiting all these years we would accomplish a pension and one that we could more or less set up in the way as they are doing it now—here is so much we will put in, and you just show us a pension plan agreeable to the company.

Q. Mr. St. John, you did not say one word to the membership assembled at Bohemian Hall, requesting them to go back to work?

A. I stated that the order stated—that the court order states they should resume work.

Q. Did you advise them to resume work?

A. I advised them, sure, but I stated it was of — avail to either request or command.

Q. What did you say?

A. I told them that is the law, the court order so states, they should go back and resume their work as it stated. I read it; I read the last paragraph.

Q. Did you offer your own advice?

A. It was not an orderly meeting; some came in and went out. As I stated before, realizing the impossibility of getting them back, in that respect my opinion was of no avail. You see, I wouldn't have any right to command or tell—

Q. Could you advise?

A. I can advise; I could recommend.

Q. Did you advise at that time?

A. Yes, to the extent they should go back to work.

[fol. 213] Q. Just what did you say?

A. I told them—I read the last paragraph.

Q. You read the order?

A. Yes.

Q. Did you offer them any advice as to what they should do?

A. When I read that, there was so much shouting and hollering I couldn't hear myself any more. They started to file out then, and out they went, so it was our concern—

Q. You mean you had no opportunity to say anything further?

A. No, there was no opportunity. Part of them were sitting down; the majority of them were milling around and

talking here, talking there, talking all over. It was not a planned meeting. Knowing these people as I did, I believed the only way we could do was to at least present them with a partial agreement or with assurance that we are in negotiations in good collective bargaining with, I might say, the pressure of the Mayor or some prominent person; that was the thought.

Examination by Mr. Raskin:

The meeting in Bohemian Hall on the afternoon of October 5th was not a regularly called meeting. That was merely a mass meeting or a place—a meeting place for our headquarters. I don't think a vote could have been taken. There was too much disorder. Any time you talked—when I even spoke of what the order said, I was answered with a lot of shouts and noises, booing. Before I even got another thought in my mind, the meeting started to break up; they started [fol. 214] to leave. The next thought was, as stated, it is of no avail to do this. Something has got to be done to get them back to work, but to tell them to go back just not to any avail; they didn't respond; they didn't abide by what they were told to do.

There were no records kept as to the number of people there. No notices were sent out for the assemblage of those people by the officers. It was simply a place where the people understood that they would meet some time during the day of the strike. There were no minutes kept of that meeting.

Examination by Mr. Fairchild:

Where that meeting got its origin I couldn't tell you because I was informed some time about 11:00 o'clock there was a lot of people going to Bohemian Hall, and that I should be over there, and I got over there some time after 1:00 o'clock, but I don't even know whether part of the officers or committees made this suggestion to the pickets. I don't know; there was no order of the union.

I did not understand from anyone that this meeting was for the purpose of making a decision as to whether the strike would continue.

When I got there, it was shortly before the deputy sheriff came in. I don't even think I was in front of the hall at

the time but there were photographers there I didn't even know; there were several of them. Finally somebody stated that a deputy sheriff wanted to come in. I heard a lot of shouting, "Keep them out," "Throw them out." Between [fol. 215] the regional director and myself, we were able to calm these fellows down, telling them—in essence we said the same thing: This fellow has a job, he has a duty, if he is there let him come in, we want to see what he wants. He was accepted into the hall, and he was rather nervous; I don't blame him. As I said before, I told him to take it easy and tell us what he wanted, which he did, and after that I read parts of the order. Because of the tremendous disorder in the hall I wanted to get the part off that they should resume work, and seeing no response or no motion—usually at a regular meeting when you read off something affecting the people, somebody would get up and make a motion to go back to work; no such motion came, in any effect. In fact, it was not asked that a motion should be in order. Some were coming in and going out when I went up there. It was a matter of finding out where everybody was; I guess that was the reason for the meeting. There was no business in an orderly way taken care of. After the meeting, we got together to figure out what could be done.

By the Court:

Q. Did you have any power to issue a call, calling off the strike or issue an order?

A. No, I have no power. According to the by-laws, my job is to call meetings and conduct meetings, and so forth; it's more or less an honorary job; see that the affairs of the union are taken care of. You have the executive board to recommend to the membership, and the governing body of the union is the membership. It states in the by-laws under [fol. 216] emergency conditions I can do things on the recommendation of the executive board.

Q. You are a member of the executive board?

A. As president, I'm an ex-officio member of all committees.

Q. Could you have called a meeting of the executive board that afternoon?

A. The executive board—the membership had voted to grant the power or right for the negotiating committee to set the hour of the strike, or words to that effect.

Q. You are a member of the negotiating committee?

A. That's right.

Q. Could you have called off the strike after that?

A. It took me three hours after that to round up the members.

Q. The negotiating committee could have called off the strike?

A. I doubt if the membership would have abided by it. They have no power; they have only power to recommend, and once they were out, I don't think they would even go back with a recommendation. Part of the same negotiating committee went around the Thursday morning after the agreement was tentatively agreed upon, and the fellows wouldn't go back then.

Q. Did you attempt to call a meeting of the negotiating committee after the service of the paper at the meeting?

A. I did. I delegated two people to go and round them up and tell them to be over at the Mayor's office. For some reason, they couldn't find them all. When they didn't show up—some did show up; we went out and rounded up the rest, [fols. 217-219] and met at the Federal Judge's office or chambers. It took that long because you appreciate the Gas Company is spread out. We have a plant over on 39th, 124th and Cleveland, 60th and Capitol, some at Solvay, 25th and St. Paul, some at the office, some at the Third Ward, some at the Third Ward plant; I didn't know where the people were. It took a bit of chasing around to round up nine members of the committee.

Q. Did you do that for the purpose of acting upon the court order?

A. That's right, we figured we could get them back to work if we could get management into good negotiations, and we figured having a prominent person prevail on the company to do that and sit in there, it would still start negotiations, so if we didn't complete it, we could call the membership and say, "Fellows, go back to work until this is settled because we are back in negotiations and believe we will get out of this in a good way."

[fols. 220-221] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 222] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

NOTICE OF APPEAL BY UNITED GAS, COKE AND CHEMICAL
WORKERS OF AMERICA—Filed May 15, 1950

To Thomas E. Fairchild, Attorney General, Madison, Wisconsin; Miller, Mack & Fairchild, Attorneys at Law, 735 North Water Street, Milwaukee, Wisconsin; Clerk of the Circuit Court, Milwaukee County, Wisconsin:

Please take notice That the defendants, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Arthur St. John, Thomas Lansing and Alvin C. Fuhrman, and each of them, hereby appeals to the Supreme Court of the State of Wisconsin from that part of the judgment of the Circuit Court of Milwaukee County entered on the 19th day of April, 1950, adjudging them guilty of civil contempt.

Max Raskin, Attorney for Appellants.

[fols. 223-224] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

WAIVER OF COST BOND—Filed May 15, 1950

The respondent, Wisconsin Employment Relations Board, hereby waives the undertaking for appeal costs as provided in Section 274.07 Wis. Statutes.

Wisconsin Employment Relations Board, by (S.)
Beatrice Lampert, Attorney.

[fol. 225] IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

ADMISSION OF SERVICE—Filed May 25, 1950

Service of copy of Notice of Appeal of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 18 day of May, 1950.

(S.) Max Raskin.

Copy.

[fol. 226] Service of copy of Notice of Appeal of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 18 day of May, 1950.

(S.) Wm. F. Quick.

[fol. 227] Service of copy of Notice of Appeal of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 18th day of May, 1950.

(S.) Miller, Mack & Fairchild, Attorneys for Defendants Milwaukee Gas Light Company, Glenn R. Chamberlain, B. T. Franck and P. J. Inse.

[fol. 228] Service of copy of Notice of Appeal of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 18th day of May, 1950.

Fred J. Jaeger, Clerk, by (S.) Ray L. Dundas, Deputy Clerk.

Copy.

[fols. 229-232] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

NOTICE OF APPEAL BY WISCONSIN EMPLOYMENT RELATIONS
BOARD—Filed May 25, 1950

Filed Jun. 5, 1950. Arthur A. McLeod, Clerk of Supreme
Court, Madison, Wis.

To Max Raskin, 606 W. Wisconsin Ave., Milwaukee, Wis-
consin; William Quick, 606 W. Wisconsin Ave., Milwau-
kee, Wisconsin; Miller, Mack & Fairchild, 753 N. Water
Street, Milwaukee, Wisconsin:

Please take notice that the plaintiff, Wisconsin Employ-
ment Relations Board, hereby appeals to the Supreme Court
of the State of Wisconsin from that part of the judgment
of the Circuit Court of Milwaukee County entered on the
19th day of April, 1950 dismissing the petition of said
Wisconsin Employment Relations Board to punish for civil
contempt Chester Walczak, Peter Lupo, Charles Nutting,
Al Helf, Cy Hackert, Ray Jonas, Charles Bauer, Al
Smidoeh, Peter Shank, Dan Burns, Joe Seborn, Dan
Kabosky, Joe Marquardt and Fred Stockfish.

Dated May 12, 1950.

Thomas E. Fairchild, Attorney General; Stewart G.
Honeck, Deputy Attorney General; Beatrice Lam-
pert, Assistant Attorney General, Attorneys for
Plaintiff.

[fols. 233-234] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

WAIVER OF COST BOND—Filed May 15, 1950

Copy of Notice of Appeal in the above entitled action
received this 10th day of May, 1950.

(S.) Miller, Mack & Fairchild, Attorneys for Milwau-
kee Gas Light Co., Glen R. Chamberlain, B. T.
Frank and P. J. Imse, defendants. By (S.) J. G.
Hardgrove.

[fol. 235] IN THE SUPREME COURT OF WISCONSIN

[Title omitted]

ARGUMENT AND SUBMISSION—October 5, 1950

And now at this day came the parties herein, by their attorneys, and this cause having been argued by William F. Quick, Esq., and Max Raskin, Esq., for the said appellants The United Gas, Coke and Chemical Workers of America et al., by Malcolm L. Riley, Esq., Assistant Attorney General, and Stewart G. Honeck, Esq., Deputy Attorney General, for the said appellant Wisconsin Employment Relations Board, and by J. G. Hardgrove, Esq., for the said defendants Milwaukee Gas Light Company et al., and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 236-237] IN SUPREME COURT OF WISCONSIN

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent and
Appellant,

vs.

MILWAUKEE GAS LIGHT COMPANY, GLEN R. CHAMBERLAIN,
President, B. T. Frank, Vice President, P. J. Inse, Secretary-Treasurer, and Chester Walczak, Defendants,

THE UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA,
DISTRICT 7, LOCAL UNION 18, Arthur St. John, Thomas
Lansing and Alvin C. Fuhrman, Appellants and Respondents. (Two notices of appeal)

JUDGMENT—November 8, 1950

This cause came on to be heard on appeals from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed.

Justice Fairchild took no part.

[fol. 238] IN SUPREME COURT OF WISCONSIN

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent and
Appellant,

v.

MILWAUKEE GAS LIGHT CO., et al., Defendants:

UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, et al.,
Appellants and Respondents

OPINION—November 8, 1950.

Appeal from a judgment of the circuit court for Milwaukee county: Otto H. Breidenbach, Circuit Judge.
Affirmed.

This is an appeal from a judgment, entered April 19, 1950, adjudging the defendants, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O. (hereinafter referred to as Union), Arthur St. John, Thomas Lansing, and Alvin C. Fuhrman, guilty of contempt for violation of an order entered October 5, 1949, and imposing a fine of \$250 as to each; and the [fol. 239] plaintiff, Wisconsin Employment Relations Board, cross-appeals from that portion of the judgment adjudging Chester Walezak and thirteen other persons not guilty of contempt for violation of the October 5, 1949 order.

This action was begun by the Wisconsin Employment Relations Board (hereinafter referred to as Board) on October 5, 1949, to enforce the provisions of subch. III of ch. 111, Stats., known as the public utility anti-strike law.

On October 5, 1949, the circuit court for Milwaukee county entered an order requiring the defendants to show cause on October 7, 1949, why temporary relief asked by the Board should not be granted, and directing the Union, St. John, Walezak, and Lansing, pending the hearing, "to absolutely desist and refrain from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service, and from picketing or causing to be picketed the premises of the Milwaukee Solvay

Coke Company (a subsidiary supplying gas).'' It was further ordered that the Union, St. John, Walczak, and Lansing ''take immediate steps to notify all employees called out on strike to resume service forthwith.''

On October 7, 1949, the parties appeared pursuant to the order of October 5, 1949, and then stipulated ''that the temporary restraining order should be continued until the final disposition of the issues upon their merits.''

[fol. 240] On petition of the Board, an order was entered on October 10, 1949, requiring the Union, the individual defendants, and certain members of the Union, including Alvin C. Fuhrman, to show cause on October 24, 1949, why they should not be punished as and for a civil contempt in failing to obey and in disobeying the order of October 5, 1949.

After trial the aforesaid judgment was entered. The trial court in its decision, findings of fact, conclusions of law, and judgment found Thomas Lansing to be in contempt. However, through inadvertence, the judgment also provided that the petition of the Board as to Thomas Lansing be dismissed. He has appealed herein and therefore has considered himself as having been found in contempt. The inconsistency in the judgment was recognized by all parties as an error.

Other material facts will be stated in the opinion.

[fol. 241] MARTIN, J.:

Prior to October 5, 1949, the membership of the Union had authorized the negotiating committee to call a strike and on October 4, 1949, the negotiating committee, consisting of defendants, Arthur St. John, Thomas Lansing, and Alvin C. Fuhrman, ordered the strike to commence at 6:00 a. m., October 5, 1949.

At 11:00 a. m., the public was advised to curtail consumption of gas and an appeal to consumers of gas was made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could be done with the main pumping facilities; the fires had to be pulled from the boilers reducing the steam pressure, and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that the air would not get into the mains so as to prevent any explosions due to the mixture of gas and air in the distribution system; the sendouts dropped to two y-five per cent of what they had been

previously. Low pressure in the system created a dangerous condition fraught with the possibility of infinite injury to the public. The public was advised by radio broadcasts and through the newspapers to shut off appliances and to shut off the service at the meter. The service was not resumed until October 6, 1949.

The restraining order was signed by the court at 12:55 p. m., and was served by the deputy sheriff upon the Union by serving its president, Arthur St. John, and upon him personally, and upon Chester Walczak, international representative, at a meeting of a large group of the members of the Union at Bohemian hall, at about 2:00 p. m., October 5th. Chester Walczak and Arthur St. John told the [fol. 242] meeting the papers served were an order to go back to work, but no statement was made calling the men back to work.

A picket line was maintained at the premises of the Coke Company from 2:00 or 3:00 p. m. and continued there until about 9:30 p. m., on Wednesday, October 5, 1949.

The Coke Company is a wholly-owned subsidiary of the Gas Company. In October, 1949, the Coke Company supplied about fifty-five to sixty per cent of the gas distributed by the Gas Company. Because of the relationship between the Coke Company and the Gas Company, the Coke Company is a public utility employer and the public utility anti-strike law applies to it.

The present proceeding does not relate back to the action of the Union voting the strike, or to the act of the negotiating committee calling the strike. It relates to matters occurring subsequent to the signing of the order and the service of same at about 2:00 p. m., on October 5th.

The order required the Union, St. John, Walczak, and Lansing to "take immediate steps to notify all employees called out on strike to resume service forthwith." Because of the seriousness of the situation already referred to resulting from the partial or complete stoppage of the essential service of furnishing gas to the public, the order required immediate compliance.

On Arthur St. John, president of the Union, a member of the executive board and of the negotiating committee, Thomas Lansing, a member of the executive board and the negotiating committee, and Alvin C. Fuhrman, vice-president of the Union and a member of the executive board and [fol. 243] negotiating committee, was placed the responsi-

bility by vote of the Union to call the strike and upon them rested the responsibility, after the service of the restraining order, to revoke the call and comply with the order of the court.

An all-night conference between Union and Gas Company officials, in which the mayor of Milwaukee and the judge of the United States district court of the eastern district of Wisconsin participated, was held on October 5th and an agreement was reached. The strike ended at 8:00 a. m., October 6th. The defendants contend that a call to the members of the Union to return to work would have been ineffectual; that they knew beyond any reasonable doubt that any order, request, or recommendation of theirs would under the circumstances then existing, have no effect whatever in getting the men back to work. They assert that there was no contumacious or wilful disobedience of the order because they immediately took action and arranged a conference in which the strike was settled, and there was only a few hours' delay in achieving the main objective of the order, which was to end the strike and get the production of gas and its distribution to consumers back to normal. These measures are not a justification for their failure to comply with the requirements of the court order.

It is true that within twenty hours the strike was settled by negotiations. However successful the negotiations may have been, it does not purge the defendants. The language of the court order is direct and unambiguous. It commanded something to be done—"take immediate steps to notify all employees called out on strike to resume service forthwith." This the defendants ignored.

[fol. 244] The acts complained of which violated the injunction constituted contempt of court and are held to have injured the Board. See *Wisconsin E. R. Board v. Allis-Chalmers W. Union* (1946), 249 Wis. 590, 25 N. W. (2d) 425.

Defendant Chester Walczak at the time in question was a regional director of the international union, but he was not a member of the negotiating committee. The immediate duty to recall the strike did not rest upon him as it did upon the members of the negotiating committee. It does not appear that his failure to disassociate himself from the continuance of the strike was an act of wilful and contumacious civil contempt.

We have carefully reviewed the evidence relating to the other thirteen union members who were dismissed in this

action. No useful purpose would be served in discussing each individually. They were either present at the meeting at the Bohemian hall or in the picket line at the Coke Company when the court order was served. The evidence does not so clearly and sufficiently establish their knowledge of the scope and requirements of this order so as to overrule the finding of the trial court. The members of the negotiating committee did not sufficiently inform them of the requirements. This finding by the trial court is a reasonable deduction from the testimony produced and must stand. The court's finding is of great weight. Its conclusion after seeing the witnesses and hearing their testimony cannot be disturbed.

The Union asserts that subch. III of ch. 111, Stats., conflicts with the Federal Labor Management Relations Act of 1947, and violates the state and federal constitutions.

The constitutionality of the public-utility anti-strike law was questioned in a previous action in this court. *United G. C. & C. Workers v. Wis. E. R. Board* (1949), 255 Wis. 154, [fol. 245] 38 N. W. (2d) 692. The law has been held to be a proper legislative enactment.

The Union relies on *International Union of U. A. A. & A. v. O'Brien* (1950), 339 U. S. 454, 94 L. ed. 659 (Adv. Op.) [same case below, 325 Mich. 250, 38 N. W. (2d) 421] wherein the constitutionality of the strike vote provision of the Michigan labor mediation law was before the court. The appellants struck against the Chrysler corporation in May, 1948, without conforming to the prescribed state procedure. The United States Supreme Court stated that even if some state legislation in this area could be sustained, the particular statute before it could not stand for it conflicts with the federal act. It was explicitly pointed out that Congress had considered in enacting the federal act, and expressly rejected, on its merits, the proposition that a strike vote ought to be prerequisite of a strike.

The lower court considered that the state police power could operate even though some of the members of the same bargaining unit were employed in Chrysler plants in California and Indiana, as well as Michigan. The United States Supreme Court is bound by the state court's interpretation of the state statute. As so interpreted, it was held that the Michigan provision conflicted with the exercise of federally protected labor rights. The court said that the regulation

of the right to peacefully strike for higher wages had been preempted by Congress.

The above case, however, relates to a private corporation whereas the instant case involves a public utility engaged in the furnishing of illuminating and heating gas to the general public in the state of Wisconsin. The total franchise area served exceeds five hundred square miles. The total population of the area is nearly eight hundred thousand [fol. 246] and. The number of customers exceeds two hundred thousand, all within the state of Wisconsin. Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that the utilities are state agencies. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers. Under a proper interpretation of the federal act, the state is still sovereign in the field covered by the public utility anti-strike law. The federal act makes provision for national emergencies, but it does not and cannot legislate in the field of local emergencies.

The *O'Brien case, supra*, was considered by this court in defendant's motion for rehearing in *United G., C. & C. Workers v. Wis. E. R. Board, supra*, wherein the constitutionality of the public utility anti-strike law was first questioned.

In the case of *In Re New Jersey Bell Telephone Co.* (October 2, 1950), 26 LRRM 2585, it was held that the New Jersey public utilities disputes act, which forbids those strikes against public utilities which might imperil health and welfare, does not conflict with provision in Labor-Management Relations Act which establishes emergency-strike procedure for disputes affecting national safety and health, since federal law does not authorize federal government to intervene in emergencies of state-wide proportions only and there is nothing in federal law forbidding intervention by states in such situations. The telephone company relied on the *O'Brien Case, supra*, and the New Jersey Supreme Court stated:

[fol. 247] "In that case the constitutionality of the strike vote provision of the Michigan labor mediation law was questioned. The Union had struck against a private industrial organization, engaged in interstate

commerce, without conforming to the prescribed state procedure; the state procedure differed from that provided in the Federal legislation, and the court decided that because of the conflict the state statute was unconstitutional. The court said that the regulation of the right to peacefully strike for higher wages had been preempted by Congress, but the case being decided by the court involved a statute regulating the right to strike against private industry. It was not a statute such as the New Jersey statute, in which a state, in the exercise of its sovereignty, seeks to maintain without interruption the supply of services, considered essential to the welfare and health of its people, being furnished by a public utility, operating under a franchise by the state, whose services furnished are primarily intrastate. It is significant that in the O'Brien case, *supra*, the court said 'Even if some legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the Federal Act.' Our examination of the Federal Act discloses no provision therein which prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the intention of Congress to exclude the states from exerting their police power must be clearly manifested, *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. ed. 1154 [10 LRR Man. 520] (1942) we con-

clude that the right of the states to prohibit strikes or lockouts in this sphere has not been preempted by Congress, and that the *O'Brien* case, *supra*, is inapplicable to the present situation."

[fol. 248] We concur with the New Jersey Supreme Court that the power still resides in the states in a proper case to prohibit strikes notwithstanding the existing federal legislation. We consider this a "proper case" within the foregoing statement and find nothing in the *O'Brien Case, supra*, of a dissuasive nature. We hold that the public utility anti-strike law does not conflict with any federal act.

By the Court.—Judgment affirmed.

[fol. 249] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 250] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 438

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed December 11, 1950

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 330, *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America vs. Wisconsin Employment Relations Board*.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES CLARK, CLERK

IN THE
Supreme Court of the United States

October Term, 1950

No. 438

UNITED GAS, COKE AND CHEMICAL WORKERS OF
AMERICA, CIO, ARTHUR ST. JOHN, THOMAS LAN-
SING, AL FUHRMAN,

Petitioners

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN**

ARTHUR J. GOLDBERG

General Counsel

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IN THE
Supreme Court of the United States

October Term, 1950

No. _____

**UNITED GAS, COKE AND CHEMICAL WORKERS OF
AMERICA, CIO, ARTHUR ST. JOHN, THOMAS LAN-
SING, AL FUHRMAN,**

Petitioners

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN**

United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C.I.O., Arthur St. John, Chester Walczak and Thomas Lansing pray that a writ of certiorari issue to review the decision of the Supreme Court of Wisconsin, entered on November 8, 1950, affirming the judgment of the Circuit Court of Milwaukee County which found the petitioners guilty of contempt of court and fined them \$250.00 each.

OPINION BELOW

The opinion of the Supreme Court of Wisconsin, a copy of which is appended hereto as Appendix A, has not yet been reported.

JURISDICTION

The mandate of the Supreme Court of Wisconsin, affirming the Circuit Court of Milwaukee County, was entered on November 8, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). The petitioners were adjudged

guilty of contempt of Court for failing to obey a temporary restraining order issued *ex parte* by the Circuit Court of Milwaukee County commanding the petitioners to take immediate steps to end a strike. The injunction was issued at the request of the Wisconsin Employment Relations Board on a complaint filed by it under the terms and the authority of Section 111.63, Wisconsin Statutes 1947. The petitioners contended at all times that no injunction could constitutionally have been issued under said section and that there could, therefore, be no finding of contempt, since the section and the chapter of which it is a part was unconstitutional and void as a violation of due process and because of its conflict with the Labor Management Relations Act, 1947, 29 U.S.C. 141-197. This contention was rejected by the trial court on the ground that the issue was *res judicata* between the parties. On appeal, the Supreme Court of Wisconsin dealt with the petitioners' contention on its merits, without mention of *res judicata*, and held the Wisconsin statute to be constitutional as applied in the instant case. The petitioners ask that this Court review, by certiorari, the decision of the Wisconsin Supreme Court on the Federal questions thus presented to and decided by the Supreme Court of Wisconsin.

QUESTIONS PRESENTED

Does subchapter III of Chapter 111 of Wisconsin Statutes, 1947, violate the 13th and 14th Amendments to the Constitution of the United States?

Is subchapter III of Chapter 111 unconstitutional because in conflict with the Labor Management Relations Act, 1947 and the public policy expressed therein?

STATUTES INVOLVED

The provisions of Subchapter III, Chapter 111, Wisconsin Statutes, 1947 (Vol. 1, page 1896) are set forth in Appendix B hereto. This subchapter provides, in short, that public utility employers in the State of Wisconsin and their employees shall have a duty (a) to exert every reasonable effort to settle labor disputes by making agreements through collective bargaining and by maintaining such agreements and (b) to prevent the collective bargaining process from reaching an im-

passee. (Section 111.52) If, despite these provisions, an impasse is reached provisions are made for the appointment of conciliators, and if conciliation fails, of arbitrators. (Sections 111.54-55) Such arbitrators are given power to make awards binding on the parties. (Section 111.59) Strikes are absolutely forbidden. (Section 111.62) The Wisconsin Employment Relations Board is given the responsibility of enforcing the subchapter and is authorized to bring action in a Wisconsin circuit court to compel performance of the duties imposed by it. (Section 111.63)

STATEMENT

This case arises out of the very same facts as are involved in *St. John et al. v. Wisconsin Employment Relations Board*, No. 302, October Term 1950, probable jurisdiction noted, October 23, 1950. The parties and the issues are substantially the same. The background and relationship of the two cases are as follows:

The petitioners herein are Local 18 of the United Gas, Coke and Chemical Workers of America (hereafter referred to as the Union) and several of its officers. On August 1st, 1943, the Union was certified by the National Labor Relations Board as the exclusive bargaining agent for the production and maintenance employees of the Milwaukee Gas Light Company (hereafter referred to as the Company). (Record, No. 302, p. 38)¹ The collective bargaining agreement between the Company and the Union expired on June 1st, 1949 (R. 302, p. 38). Upon its expiration, the Federal Mediation and Conciliation Service, acting pursuant to the Labor Management Relations Act, intervened and attempted to assist in the negotiations for

¹ As indicated in the motion to dispense with the printing of the record, submitted herewith, the certified record in this case was received too late to permit submission of a printed record on consideration of the petition for certiorari. Accordingly, counsel for petitioners have submitted as a separate Appendix C to this petition, copies of the petitioners' brief in the Supreme Court of Wisconsin. This brief contains, in an appendix, the pleadings in the Circuit Court, the decision and judgment of that Court, and all other portions of the record relevant to the consideration of the constitutional issues raised herein. References to this Appendix will be made as "App. p. ____". The record in No. 302, covering as it does the same facts, will be referred to herein as "R. 302, p. ____".

a new contract. Thereafter, on September 19, 1950, the Union filed charges with the National Labor Relations Board, charging that the Company had violated the Labor-Management Relations Act by refusing to bargain collectively with the Union. Such charges were pending before the NLRB during all of the proceedings below. Subsequent to the filing of charges, there were negotiations between the parties but no agreement was reached.

At 6 A.M. on October 5th, 1950, the employees of the Company went on strike. At about 11 A.M. of the same day the Wisconsin Employment Relations Board, acting under the provisions of subchapter III, Chapter 111, Wisconsin Statutes 1947, filed a complaint (App., p. 122) charging (a) that the Company had failed and neglected to exert every reasonable effort to settle the dispute by collective bargaining and (b) that the officials of the Union had voted to call a strike and had, in fact, called a strike and established a picket line. The Board alleged that both the Company and the Union were thus acting in violation of subchapter III¹ and that the Board was charged with the enforcement of compliance with that chapter. It asked for an injunction against both the Company and the Union. An *ex parte* temporary restraining order was issued against the Company and the Union and served upon some of the petitioners at about 2 P.M. Thereafter, a conference was arranged between the Company and the Union, which continued throughout the night of October 5th. At about 8 A.M. the next morning an agreement was reached, a contract was signed and the strike was terminated. (App., p. 116.)

On October 18th, 1950, the petitioners herein, and others, filed a complaint, now before this Court in No. 302, in the federal District Court for the Eastern District of Wisconsin. The complaint alleged that various punishments were threatened by virtue of the facts above set forth, including contempt cita-

¹ The Company was alleged to be violating Sec. 111.52 by failing to take every reasonable effort "to prevent the collective bargaining process from reaching a state of impasse." The Union was alleged to be violating Sec. 111.62 by instigating, inducing, etc., a strike which caused interruption of an essential service.

tions and criminal action against the Union and its officers (R. 302, p. 7). It asked the Court to enjoin any proceedings against the petitioners on the ground that the Wisconsin statute under which such action was threatened was unconstitutional and void.

As the Court is aware, the federal District Court—a three-judge court—refused the relief requested and dismissed the complaint on the theory that a prior litigation in the Wisconsin Courts in which some of the petitioners, herein were parties, *United Gas, Coke and Chemical Workers v. Wisconsin Employment Relations Board*, 255 Wis. 154, precluded the petitioners from again raising the constitutional issues (R. 302, p. 59). One judge dissented from the holding on the issue of *res judicata*. The constitutional issues were not reached. An appeal was taken to this Court and probable jurisdiction was noted on October 23, 1950.

Meanwhile, the Wisconsin Employment Relations Board had petitioned the Circuit Court of Milwaukee County to issue an order to show cause why the petitioners should not be adjudged guilty of contempt for failing to call off the strike immediately upon issuance of the temporary restraining order (App. p. 166). On October 10, 1949, such an order was issued (App. p. 164). The petitioners raised the same constitutional objections which they sought to raise in the federal District Court (App. p. 134). The result was the same. The Circuit Court held, as did the federal District Court, that those issues were *res judicata* by virtue of the prior decision of the Wisconsin Supreme Court. On March 14, 1950, it found petitioners guilty of contempt and fined them \$250.00 each (App. p. 101).

The petitioners appealed to the Wisconsin Supreme Court. They argued that the prior litigation did not constitute *res judicata* on the constitutional issues and argued those issues on the merits. The Wisconsin Supreme Court—the very Court whose prior judgment had been urged to constitute *res judicata*—apparently did not so regard its judgment. It dealt with the Federal issues on their merits. On November 8, 1950, it held that the petitioners contentions on the merits

were unsound and that the Wisconsin statute, as applied, did not conflict with Federal law. It is this decision which is sought to be reviewed herein.

REASONS FOR GRANTING THE WRIT

1. The proceedings involved here are the very proceedings which were sought to be enjoined in the federal District Court in the case which is now before this Court on appeal in No. 302. The facts are the same as in No. 302. The parties are, for the most part, the same.* The substantive constitutional issues are the same.

There is only one significant difference. The false issue of *res judicata* is not present in this case. The Wisconsin Supreme Court was urged strongly to uphold the ruling of the Circuit Court of Milwaukee County that the petitioners were barred by the prior decision of the Wisconsin Supreme Court from contesting the constitutionality of the Wisconsin statute. The Wisconsin Court, however, refused to adopt that position. It noted its prior decision on the general constitutionality of the Act and then dealt on the merits with the constitutional contentions of the petitioners in this case. It affirmed the finding of contempt because it found that the Wisconsin statute under which the restraining order had been issued was not in conflict with federal legislation and, hence, was valid and effective.

This Court now has No. 302 before it. If the Court in No. 302 should reverse—as it should—the ruling of the District Court on the *res judicata* issue, the substantive constitutional issues would remain. Those issues are presented identically by the present case. A grant of certiorari in this case would enable the Court to reach directly the substantive and important constitutional issues which are posed only secondarily in No. 302.

2. A grant of certiorari in this case would also permit this Court to review directly the considered decision of the Wisconsin Supreme Court as to the effect of the decision in *Auto-*

* All of the petitioners herein are appellants in No. 302. Some of the appellants in No. 302 were not adjudged guilty of contempt and hence are not parties to this petition.

mobile Workers v. O'Brien, 339 U.S. 454, upon the constitutionality of the Wisconsin public utility anti-strike law. That statute is before the Court not only in No. 302 but also in *Amalgamated Association, etc. v. Wisconsin Employment Relations Board*, Nos. 329 and 330, certiorari granted November 6, 1950. The latter cases involve the same issues—although in different context—as those presented in No. 302 and in this case. The decisions of the Wisconsin Supreme Court in Nos. 329 and 330, however, predated the *O'Brien* opinion. Hence, the decisions in the present case, and only the decision in this present case, presents squarely for review a decision of the Wisconsin Supreme Court made in the light of and with consideration given to the opinion of this Court in the *O'Brien* case.*

3. The record in this case makes startlingly apparent the extent to which the Wisconsin statute and the Labor-Management Relations Act, 1947, overlap and conflict. The Wisconsin statute is a comprehensive statute governing labor-management relations in public utilities. In Section 111.52 it imposes a duty upon public utility employers and their employees to make every reasonable effort to settle labor disputes by collective bargaining. This statutory command is enforceable by injunction and was, in fact, enforced against the Company by the restraining order issued in this case.

We thus have a complete overlapping of the Federal statute. The Labor-Management Relations Act, 1947, imposes both upon unions and employers the duty to bargain collectively. It provides machinery for the adjudication of charges that this duty has not been performed and it provides a mechanism for enforcing such adjudications. The Wisconsin statute, wholly independently, prescribes a similar duty and a wholly different mechanism for adjudication and enforcement. We thus have the very real possibility, not only of dual enforcement of the same obligation, but also of contradictory adjudi-

*The statement in the opinion of the Wisconsin Supreme Court that the court had considered the *O'Brien* case on motion for rehearing in *United G., C. & C. Workers v. Wis. E. R. Board*, is an obvious oversight. The *Gas, Coke & Chemical Workers* case was decided on July 12, 1949. No motion for rehearing was filed. The *O'Brien* case was decided by this court on May 8, 1950.

cations as to whether a company or a union have complied with the duty to bargain collectively.

This potential conflict is made clear in the present case. Here we had a complaint filed by the Union with the National Labor Relations Board, and pending before it, which charged the Company with a refusal to bargain collectively. We also had a complaint, on which an injunction issued, filed by the Wisconsin Employment Relations Board in a Wisconsin Court, charging that the Company failed to make every reasonable effort to settle the dispute with the Union by collective bargaining. The possibilities of conflict in these contemporaneous and independent proceedings are manifest.

4. The issue of *res judicata* in No. 302 is, as shown by the decision of the Wisconsin Supreme Court in this case, a false issue. But there exists a very real possibility that a substantial issue of *res judicata* would be created if this Court should deny certiorari in this case and should ultimately hold, in the other cases before it, that the Wisconsin statute is void. A final decision now having been made against the petitioners in the Wisconsin Courts, they would thereafter be precluded from contesting the validity of the Wisconsin statute and of their contempt citations if this case is not accepted for review.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for certiorari should be granted and that this case should be set for argument with No. 302 and Nos. 329-330.

Respectfully submitted,

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APPENDIX A.

Wisconsin Statutes.

SUBCHAPTER III.

Public Utilities.

111.50 Declaration of Policy. It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 Definitions. When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employees.

(2) "Essential service" means furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin Employment Relations Board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 *Settlement of Labor Disputes Through Collective Bargaining and Arbitration.* It shall be the duty of public utility employers and their employees in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 *Appointment of Conciliators and Arbitrators.* Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

111.54 Conciliation. If in any case of a labor dispute between a public utility employer and its employees, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employees are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 Conciliator Unable to Effect Settlement; Appointment of Arbitrators. If the conciliator so named is unable to effect a settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 Status Quo to Be Maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

111.57 Arbitrator to Hold Hearings. (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in dispute.

Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The over-all compensation presently received by the em-

employees having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employees. The foregoing enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 *Standards for Arbitration.* The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 *Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity.* The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit of the county wherein the dispute arose or where the majority of the employees involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay

shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be a matter for collective bargaining or decision by the arbitrator.

111.60 *Judicial Review of Order of Arbitrator.* Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

111.61. *Board to Establish Rules.* The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 *Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty.* It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to

conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 *Enforcement.* The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 *Construction.* (a) Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employees, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 *Separability.* It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereof.

APPENDIX B

No. 66

August Term, 1950

STATE OF WISCONSIN: IN SUPREME COURT

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent and Appellant

v.

MILWAUKEE GAS LIGHT CO., et al,

Defendants

**UNITED GAS, COKE AND CHEMICAL WORKERS OF
AMERICA, et al,**

Appellants and Respondents

**APPEAL from a judgment of the Circuit Court for Milwaukee
County: Otto H. Breidenbach, Circuit Judge. Affirmed.**

This is an appeal from a judgment, entered April 19, 1950, adjudging the defendants, United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C.I.O. (hereinafter referred to as Union), Arthur St. John Thomas Lansing, and Alvin C. Fuhrman, guilty of contempt for violation of an order entered October 5, 1949, and imposing a fine of \$250 as to each; and the plaintiff Wisconsin Employment Relations Board, cross-appeals from that portion of the judgment adjudging Chester Walczak and thirteen other persons not guilty of contempt for violation of the October 5, 1949 order.

This action was begun by the Wisconsin Employment Relations Board (hereinafter referred to as Board) on October 5, 1949, to enforce the provisions of subch. III of ch. 111, Stats., known as the public utility anti-strike law.

On October 5, 1949, the circuit court for Milwaukee county entered an order requiring the defendants to show cause on October 7, 1949, why temporary relief asked by the Board should not be granted, and directing the Union, St. John, Walczak, and Lansing, pending the hearing, "to absolutely desist and refrain from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service, and from picketing or causing to be picketed the premises of the Milwaukee Solvay Coke Company (a subsidiary supplying gas)." It was further ordered that the Union, St. John, Walczak, and Lansing "take immediate steps to notify all employees called out on strike to resume service forthwith."

On October 7, 1949, the parties appeared pursuant to the order of October 5, 1949, and then stipulated "that the temporary restraining order should be continued until the final disposition of the issues upon their merits."

On petition of the Board, an order was entered on October 10, 1949, requiring the Union, the individual defendants, and certain members of the Union, including Alvin C. Fuhrman, to show cause on October 24, 1949, why they should not be punished as and for a civil contempt in failing to obey and in disobeying the order of October 5, 1949.

After trial the aforesaid judgment was entered. The Trial court in its decision, findings of fact, conclusions of law, and judgment found Thomas Lansing to be in contempt. However, through inadvertence, the judgment also provided that the petition of the Board as to Thomas Lansing be dismissed. He has appealed herein and therefore has considered himself as having been found in contempt. The inconsistency in the judgment was recognized by all parties as an error.

Other material facts will be stated in the opinion.

MARTIN, J. Prior to October 5, 1949, the membership of the Union had authorized the negotiating committee to call a

strike and on October 4, 1949, the negotiating committee, consisting of defendants, Arthur St. John, Thomas Lansing, and Alvin C. Fuhrman, ordered the strike to commence at 6:00 A.M., October 5, 1949.

At 11:00 A.M., the public was advised to curtail consumption of gas and an appeal to consumers of gas was made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could be done with the main pumping facilities; the fires had to be pulled from the boilers, reducing the steam pressure, and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that the air would not get into the mains so as to prevent any explosions due to the mixture of gas and air in the distribution system; the sendouts dropped to twenty-five per cent of what they had been previously. Low pressure in the system created a dangerous condition fraught with the possibility of infinite injury to the public. The public was advised by radio broadcasts and through the newspapers to shut off appliances and to shut off the service at the meter. The service was not resumed until October 6, 1949.

The restraining order was signed by the court at 12:55 P.M., and was served by the deputy sheriff upon the union, by serving its president, Arthur St. John, and upon him personally, and upon Chester Walczak, international representative, at a meeting of a large group of the members of the Union at Bohemian hall, at about 2:00 P.M., October 5th. Chester Walczak and Arthur St. John told the meeting the papers served were an order to go back to work, but no statement was made calling the men back to work.

A picket line was maintained at the premises of the Coke Company from 2:00 or 3:00 P.M. and continued there until about 9:30 P.M., on Wednesday, October 5, 1949.

The Coke Company is a wholly owned subsidiary of the Gas Company. In October, 1949, the Coke Company supplied about fifty-five to sixty per cent of the gas distributed by the Gas Company. Because of the relationship between the Coke Company and the Gas Company, the Coke Company is a public utility employer and the public utility anti-strike law applies to it.

The present proceeding does not relate back to the action of the Union voting the strike, or to the act of the negotiating committee calling the strike. It relates to matters occurring subsequent to the signing of the order and the service of same at about 2:00 P.M., on October 5th.

The order required the Union, St. John, Walczak, and Lansing to "take immediate steps to notify all employees called out on strike to resume service forthwith." Because of the seriousness of the situation already referred to resulting from the partial or complete stoppage of the essential service of furnishing gas to the public, the order required immediate compliance.

On Arthur St. John, president of the Union, a member of the executive board and of the negotiating committee, Thomas Lansing, a member of the executive board and the negotiating committee, and Alvin C. Fuhrman, vice-president of the Union and a member of the executive board and negotiating committee, was placed the responsibility by vote of the Union to call the strike and upon them rested the responsibility, after the service of the restraining order, to revoke the call and comply with the order of the court.

An all-night conference between Union and Gas Company officials, in which the mayor of Milwaukee and the judge of the United States district court of the eastern district of Wisconsin participated, was held on October 5th and an agreement was reached. The strike ended at 8:00 A.M., October 6th. The defendants contend that a call to the members of the Union to return to work would have been ineffectual; that they knew beyond any reasonable doubt that any order, request, or recommendation of theirs would, under the circumstances then existing, have no effect whatever in getting the men back to work. They assert that there was no contumacious or willful disobedience of the order because they immediately took action and arranged a conference in which the strike was settled, and there was only a few hours' delay in achieving the main objective of the order, which was to end the strike and get the production of gas and its distribution to consumers back to normal. These measures are not a justifi-

cation for their failure to comply with the requirements of the court order.

It is true that within twenty hours the strike was settled by negotiations. However successful the negotiations may have been, it does not purge the defendants. The language of the court order is direct and unambiguous. It commanded something be done—"take immediate steps to notify all employees called out on strike to resume service forthwith." This the defendants ignored.

The acts complained of which violated the injunction constituted contempt of court and are held to have injured the Board. See *Wisconsin E. R. Board v. Allis-Chalmers W. Union* (1946). 249 Wis. 590, 25 N.W. (2d) 425.

Defendant Chester Walczak at the time in question was a regional director of the international union, but he was not a member of the negotiating committee. The immediate duty to recall the strike did not rest upon him as it did upon the members of the negotiating committee. It does not appear that his failure to disassociate himself from the continuance of the strike was an act of wilful and contumacious civil contempt.

We have carefully reviewed the evidence relating to the other thirteen union members who were dismissed in this action. No useful purpose would be served in discussing each individually. They were either present at the meeting at the Bohemian hall or in the picket line at the Coke Company when the court order was served. The evidence does not so clearly and sufficiently establish their knowledge of the scope and requirements of this order so as to overrule the finding of the trial court. The members of the negotiating committee did not sufficiently inform them of the requirements. This finding by the trial court is a reasonable deduction from the testimony produced and must stand. The court's finding is of great weight. Its conclusion after seeing the witnesses and hearing their testimony cannot be disturbed.

The Union asserts that subchapter III of chapter 111, Stats., conflicts with the Federal Labor Management Relations Act of 1947, and violates the state and federal constitutions.

The constitutionality of the public utility anti-strike law was questioned in a previous action in the court. *United G., C. & C. Workers v. Wis. E. R. Board* (1949), 255 Wis. 154, 38 N. W. (2d) 692. The law has been held to be a proper legislative enactment.

The Union relies on *International Union of U.A.A. & A. v. O'Brien* (1950), 339 U. S. 454, 94 L. ed. 659 (Adv. Op.) [same case below, 325 Mich. 250, 38 N.W. (2d) 421] wherein the constitutionality of the strike vote provision of the Michigan labor mediation law was before the court. The appellants struck against the Chrysler corporation in May, 1948, without conforming to the prescribed state procedure. The United States Supreme Court stated that even if some state legislation in this area could be sustained, the particular statute before it could not stand for it conflicts with the federal act. It was explicitly pointed out that Congress had considered in enacting the federal act, and expressly rejected, on its merits, the proposition that a strike vote ought to be prerequisite of a strike.

The lower court considered that the state police power could operate even though some of the members of the same bargaining unit were employed in Chrysler plants in California and Indiana, as well as Michigan. The United States Supreme Court, is bound by the state court's interpretation of the state statute. As so interpreted, it was held that the Michigan provision conflicted with the exercise of federally protected labor rights. The court said that the regulation of the right to peacefully strike for higher wages had been preempted by Congress.

The above case, however, relates to a private corporation whereas the instant case involves a public utility engaged in the furnishing of illuminating and heating gas to the general public in the state of Wisconsin. The total franchise area served exceeds five hundred square miles. The total population of the area is nearly eight hundred thousand. The number of customers exceeds two hundred thousand, all within the state of Wisconsin. Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that

the utilities are state agencies. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers. Under a proper interpretation of the federal act, the state is still sovereign in the field covered by the public utility anti-strike law. The federal act makes provision for national emergencies, but it does not and cannot legislate in the field of local emergencies.

The *O'Brien case*, *supra*, was considered by this court in defendant's motion for rehearing in *United G., C. & C. Workers v. Wis. E. R. Board*, *supra*, wherein the constitutionality of the public utility anti-strike law was first questioned.

In the case *In Re New Jersey Bell Telephone Co.* (October 2, 1950), 26 LRRM 2585, it was held that the New Jersey public utilities disputes act, which forbids those strikes against public utilities which might imperil health and welfare, does not conflict with provision in Labor-Management Relations Act which establishes emergency-strike procedure for disputes affecting national safety and health, since federal law does not authorize federal government to intervene in emergencies of state-wide proportions only and there is nothing in federal law forbidding intervention by states in such situations. The telephone company relied on the *O'Brien case*, *supra*, and the New Jersey Supreme Court stated:

"In that case the constitutionality of the strike vote provision of the Michigan labor mediation law was questioned: The Union had struck against a private industrial organization, engaged in interstate commerce, without conforming to the prescribed state procedure; the state procedure differed from that provided in the Federal legislation and the court decided that because of the conflict the state statute was unconstitutional. The Court said that the regulation of the right to peacefully strike for higher wages had been preempted by Congress, but the case being decided by the Court involved a statute regulating the right to strike against private industry. It was not a statute such as the New Jersey statute, in which a state, in the exercise of its sovereignty, seeks to maintain without interruption the supply of services, considered essential to the welfare and health of its people, being furnished by a public utility, operating under a franchise by the state, whose services furnished are primarily intra-

state. It is significant that in the *O'Brien case, supra*, the court said 'Even if some legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the Federal Act.' Our examination of the Federal Act discloses no provision therein which prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested' *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. ed. 1154 [10 LRR Man. 520] we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been preempted by Congress, and that the *O'Brien case, supra*, is inapplicable to the present situation."

We concur with the New Jersey Supreme Court that the power still resides in the states in a proper case to prohibit strikes notwithstanding the existing federal legislation. We consider this a "proper case" within the foregoing statement and find nothing in the *O'Brien case, supra*, of a dissuasive nature. We hold that the public utility anti-strike law does not conflict with any federal act.

By the Court.—Judgment affirmed.

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IN THE
Supreme Court of the United States

October Term, 1950

**UNITED GAS, COKE AND CHEMICAL WORKERS OF
AMERICA, CIO, ARTHUR ST. JOHN, THOMAS LAN-
SING, AL FUHRMAN,**

Petitioners

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WISCONSIN**

BRIEF FOR PETITIONERS

ARTHUR J. GOLDBERG

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**IN THE
Supreme Court of the United States**

October Term, 1950

No. 438

**UNITED GAS, COKE AND CHEMICAL WORKERS OF
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SING, AL FUHRMAN,**

Petitioners

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF WISCONSIN**

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of Wisconsin (R. 81)
has not yet been reported.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. 1257 (3).
The petition for certiorari ~~was~~ granted on December 11, 1950.

QUESTIONS PRESENTED

Subchapter III of Chapter 111, Wisconsin Statutes, 1947,
prohibits strikes by employees of public utilities and provides
for the compulsory arbitration of disputes between utilities
and their employees. The questions presented are whether
this state statute is unconstitutional—

(1) As applied to a company engaged in interstate commerce, because it conflicts with the federal Labor Management Relations Act, 1947, or invades fields which Congress has occupied by the enactment of that statute, or

(2) Because it violates the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

STATUTE INVOLVED

The provisions of Subchapter III, Chapter 111, Wisconsin Statutes, 1947, are set forth in full in the Appendix, *infra* pp. 34 ff. and are summarized in the Argument, *infra* pp. 8 ff.

STATEMENT

This case arises out of the same labor dispute as does *St. John et al. v. Wisconsin Employment Relations Board*, No. 302, October Term 1950, probable jurisdiction noted, October 23, 1950.

The petitioners herein are Local 18 of the United Gas, Coke and Chemical Workers of America, CIO (hereafter referred to as the Union), and several of its officers. In 1943 the Union was certified by the National Labor Relations Board as the exclusive bargaining agent for the production and maintenance employees of the Milwaukee Gas Light Company (hereafter referred to as the Company). 52 NLRB 1213; Record, No. 302, p. 38.¹ In 1946 the Board conducted an election among the supervisory employees of the Company, which resulted in

¹ Under the practice prevailing in the Supreme Court of Wisconsin, each party prints as an appendix to his brief the particular portions of the record on which he relies, although the entire typed transcript of record is before the court. Due to the shortage of time for getting this case before this Court, and by oral agreement of counsel, there has been printed as the record in this Court only the appendix to the Union's brief in the Supreme Court of Wisconsin, plus the proceedings in that court. The typed transcript of the record which was before the Supreme Court of Wisconsin covers the background of the strike, but that portion of the record was not printed in the Union's appendix, and hence is not in the printed record in this case in this Court. However, the same material is contained in a stipulation in the record in No. 302, which involves the same labor dispute and the same parties as the present case. To avoid the delay which would be entailed in securing the certification of an additional portion of the record in this case by the Clerk of the Supreme Court of Wisconsin, reference will be made to the record in No. 302. That record will be referred to herein as R. 302, p. ——. The record in the present case will be cited as R. ——.

a vote adverse to the Union (R. 302, p. 41). In each of these cases the National Board found that the Company was engaged in commerce within the meaning of the National Labor Relations Act (R. 302, p. 41).

Thereafter successive collective bargaining agreements were entered into between the Company and the Union, of which the most recent preceding the strike terminated on June 1st, 1949 (R. 302, p. 38). Some months before that date notice of termination was given by the Union to the Company and to the Federal Mediation and Conciliation Service, as required by the contract and by Section 8(d) of the National Labor Relations Act. In response to this notification, the Federal Mediation and Conciliation Service intervened to assist in the negotiation of a new contract (R. 302, p. 38). The Wisconsin Employment Relations Board, acting under Section 111.54 of the Wisconsin Statutes, 1947, likewise appointed a conciliator for the purpose of attempting to settle the dispute (R. 302, p. 15).

On September 19, 1949, the Union filed with the National Labor Relations Board charges that the Company had violated the National Labor Relations Act by refusing to bargain collectively with the Union (R. 302, pp. 38-39). These charges were pending before the NLRB during all of the proceedings below. Subsequent to the filing of charges, the Company did bargain collectively with the Union, but no agreement was reached at that time (R. 302, p. 39).

On September 28, 1949, the Company filed with the Wisconsin Employment Relations Board a petition for the appointment of a conciliator. The petition alleged that the Company was a public utility employer within the meaning of the State statute; that its production and maintenance employees were represented for collective bargaining by the Union; that the last agreement between the Company and the Union had been terminated by the Union; that the Company had attempted through collective bargaining to negotiate a new contract with the Union but that negotiations have reached an impasse; and that the parties would be unable to settle the dispute without the intervention of the "conciliation and/or arbitration processes provided for" in Chapter III of the Wisconsin Statutes.

The petition requested the appointment of a conciliator for the purposes set forth in Sections 111.54 and 111.55 of the Wisconsin Statutes (R. 302, p. 1314).

On October 3, 1949, the Wisconsin Board issued an "Order Appointing Arbitrators" pursuant to Section 111.55 of the State Statute (R. 39). The order named five persons as those from which a Board of Arbitration to determine the dispute would be elected. It directed the Company and the Union to meet for the purposes of each striking one name from the list, the remaining three persons to be designated by the State Board as the Board of Arbitration "to which will be submitted the issues in dispute between the parties".

On October 4, 1949, the Union filed suit in the Federal District Court for the Eastern District of Wisconsin to enjoin the Wisconsin Board and others from compelling the Union to submit the dispute to arbitration or from otherwise enforcing against the Union the provisions of the Wisconsin Statute (R. 302, pp. 16-17, 12-13). That proceeding is now before this Court in No. 302.

At 6 A. M. on October 5th, 1949, the employees of the Company went on strike (R. 11). At about 11 A. M. of the same day the Wisconsin Board, acting under the provisions of subchapter III, Chapter 111, Wisconsin Statutes 1947, filed a complaint in the Circuit Court of Milwaukee County against the Company, the Union, and various officers of each. The complaint alleged that the Company was a public utility; that the Union was the collective bargaining representative of certain of the Company's employees; that these employees were engaged in the performance of service essential to the public; that a labor dispute existed between the Company and the Union with respect to wages, hours and other conditions of employment; and that the Union had called a strike and established a picket line (R. 16-19). The complaint further alleged that the Company had failed and neglected to exert every reasonable effort to settle the dispute by collective bargaining; that the strike would cause an interruption of an essential service to the public; that the Company was violating Section 111.52 by failing to take every reasonable effort "to prevent the collective bargaining process from reaching a state of im-

passee"; and that the Union was violating Section 111.62 by instigating and inducing a strike which would cause interruption of an essential service.

The Wisconsin Board asked for an injunction against both the Company and the Union. It asked that the Company be enjoined from "failing and neglecting to exert every reasonable effort to settle any labor dispute" between the Company and the Union "and to prevent the collective bargaining process from reaching a state of impasse and stalemate"; and that the Union be enjoined "from calling a strike, going out on strike, or causing any work stoppage" (R. 19). An *ex parte* temporary restraining order was thereupon issued against both the Company and the Union, and was served upon some of the petitioners at about 2 P. M. (R. 19).

Thereafter, a conference was arranged between the Company and the Union, which continued throughout the night of October 5th. At about 8 A. M. the next morning an agreement was reached, a contract was signed and the strike was terminated (R. 11).

Following the settlement of the strike, the Wisconsin Employment Relations Board petitioned the Circuit Court of Milwaukee County to issue an order to show cause why the petitioners should not be adjudged guilty of contempt for failing to call off the strike immediately upon issuance of the temporary restraining order (R. 43). On October 10, 1949, such an order was issued (R. 42).

In their answer to the Wisconsin Board's complaint, the petitioners asserted that Subchapter III, Chapter 111 of the Wisconsin Statutes, 1947, was unconstitutional as in conflict with the Federal Labor Management Relations Act, 1947 (R. 24). The Circuit Court held, however, that the decision theretofore rendered by the Supreme Court of Wisconsin in *United Gas, Coke and Chemical Workers v. Wisconsin Employment Relations Board*, 255 Wis. 154, a suit for a declaratory judgment to which some of the petitioners were parties, was *res judicata* as to the constitutionality of the Wisconsin Act (R. 3-5). On March 14, 1950, the Circuit Court found petitioners guilty of contempt and fined them \$250.00 each (R. 8).

On October 18, 1949, the petitioners herein, and others, filed

an amended complaint in the suit in the Federal District Court for the Eastern District of Wisconsin which is now before this Court in No. 302. The complaint alleged that various punishments were threatened by virtue of the facts above set forth, including contempt citations and criminal action against the Union and its officers (R. 302, p. 7). The petitioners asked the District Court to enjoin any proceeding against them, on the ground that the Wisconsin Statute was unconstitutional and void as in conflict with the Federal Act. On April 28, 1950, a three judge District Court held, with one judge dissenting, in accord with the decision of the State Circuit Court, that the prior decision of the Wisconsin Supreme Court was *res judicata* as to the constitutional issues.

An appeal was taken to this Court, and probable jurisdiction was noted on October 23, 1950. No. 302 this term.

The petitioners in the present case had in the meantime appealed the state court litigation to the Wisconsin Supreme Court. That Court held on November 8, 1950, that the Wisconsin Statute did not conflict with the Federal law and was constitutional (R. 81). The Wisconsin Supreme Court, whose prior judgment had been held to be *res judicata* by the State Circuit Court and by the three judge Federal District Court, did not in its opinion so much as suggest that its prior judgment was *res judicata*. It dealt with the constitutional issues on their merits.

In its opinion the Supreme Court of Wisconsin declared that the decision of this Court in *Automobile Workers v. O'Brien*, 339 U. S. 454, was distinguishable from the present case because the *O'Brien* case dealt with a private corporation, whereas the present case involved a public utility. The Wisconsin Court noted that in the *O'Brien* case this Court had said "that the regulation of the right to peacefully strike for higher wages had been pre-empted by Congress", but went on to declare, however (R. 86), that

"Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that the utilities are state agencies. They perform functions which the states might perform directly rather than through

agencies to which they delegate their own powers. Under a proper interpretation of the federal act, the state is still sovereign in the field covered by the public utility anti-strike law. The federal act makes provision for national emergencies, but it does not and cannot legislate in the field of local emergencies."

The Wisconsin Court also referred with approval to the decision of the Supreme Court of New Jersey in re *New Jersey Bell Telephone Co.*, decided October 2, 1950, 26 LRRM 2585, and concluded "that the public utility anti-strike law does not conflict with any Federal Act".

This Court granted certiorari on December 11, and assigned the case for argument following Nos. 302, 329 and 330.

SPECIFICATION OF ERRORS

The Supreme Court of Wisconsin erred:

1. In holding that Subchapter III, Chapter 111, Wisconsin Statutes, 1947, is constitutional, and in failing to hold that it is unconstitutional.
2. In affirming the judgment of the Circuit Court for Milwaukee County adjudging the petitioners guilty of contempt, and in failing to reverse that judgment.

ARGUMENT

Petitioners' position, most broadly stated, is that Congress, in enacting the Labor-Management Relations Act, 1947, intended to and did provide a broad national code to govern exclusively labor-management relations in industries affecting commerce. It is the petitioners' position that, except as otherwise specified in the Labor-Management Relations Act itself, that Act fully occupies the field of regulation of labor-management relations, and leaves to the states only the power to curb violations of the peace. As stated in *People of State of California v. Zook*, 336 U. S. 725, 734—

"the tradition of 'usual police powers' is still of aid in determining congressional intent to exclude State action on interstate commerce, at least when Congress has legislated."

However, it is not necessary for the petitioners to sustain this broad proposition in order to prevail in the present case. At the least the National Act fully occupies the fields of regulation of collective bargaining and of the right to strike in industries affecting commerce. Moreover the Wisconsin Statute here involved squarely conflicts both with general policy of the National Act and with various of its detailed provisions.

Petitioners will present first their contention that the Wisconsin Act conflicts with the Federal Act, and thereafter the broader propositions that the Federal Act occupies the entire field of labor relations to the exclusion of state regulatory action, or, at the least, the fields of regulation of collective bargaining and of the right to strike.

I

THE WISCONSIN STATUTE CONFLICTS WITH THE NATIONAL ACT

The Wisconsin Statute and the National Act rely on diametrically opposite means of promoting sound labor relations. The Wisconsin Act employs compulsory arbitration and prohibits strikes, while the National Act relies on agreements voluntarily arrived at through collective bargaining, and does not provide for compulsory arbitration or absolutely ban strikes even in "national emergency" disputes. As is to be expected in view of this square conflict between the basic schemes of the two Acts, the Acts also conflict in numerous details.

A. The Provisions of the State Act

The Wisconsin Statute with which we are here concerned is Subchapter III of Chapter 111, Wisconsin Statutes, 1947, dealing with labor relations between public utility companies and their employees.

The Statute declares at the outset, in Section 111.50, that "the interruption of public utility service" results in damage to the public justifying action to protect the general welfare, and that it is the public policy of the State (a) to facilitate the

peaceful settlement of labor disputes between public utility companies and their employees through the making and maintaining of collective bargaining agreements, and (b) "to provide settlement procedures" for such disputes "in cases where the collective bargaining process has reached an impasse".

Pursuant to this declaration of policy the Wisconsin Act provides, in Section 111.52, that it shall be the duty of public utility employers and employees "to exert every reasonable effort" to settle their labor disputes through collective bargaining, and (§111.54) that if negotiations reach an impasse the Wisconsin Employment Relations Board shall appoint a conciliator to attempt to effect a settlement.

If, however, the conciliator is unable to effect a settlement within 15 days, the Employment Relations Board must then appoint an arbitrator or arbitrators "to hear and determine such dispute" (§111.55). The mechanism of selection is that which was used in the present case: viz., the Board appoints a panel of either three or five persons from which each of the parties strikes one name, with the person or persons remaining serving as the arbitrator or arbitrators.

During the pendency of conciliation or arbitration proceedings the existing wages, hours or conditions of employment may not be changed by either party without the consent of the other (§111.50).

The arbitrator (or arbitrators) is required to conduct hearings and to make a written decision on each issue in dispute (§111.57). He may compel the attendance of witnesses and the furnishing of information. If a valid contract is in effect, the arbitrator is empowered only to determine its interpretation. If no contract is in effect, "or where there is a contract, but the parties have begun negotiations looking to a new contract or an amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute", the arbitrator "in arriving at a decision" is directed to give weight to a number of enumerated factors. These factors (set forth in §111.57(3)) are (a) and (b) comparison of wage rates or other working conditions with those prevailing in the local operating area, and for workers possessing similar skills; (c) the value of the

service to the consumer; (d) the desirability of establishing differentials for different areas; and (e) the total over-all compensation received by the employees including fringe benefits. However, (§111.57(3)(e)) the enumeration of these factors is not to preclude the arbitrator from taking into account other factors "which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties".

The Statute provides, however (§111.58), that: "The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business . . ."

The decision of the arbitrator (or of a majority of the arbitrators) must be filed with the Circuit Court of the county (§111.59). Unless the award is reversed upon a petition for review, it becomes binding upon "and shall control the relationship between" the parties for a period of one year, except that the order may be changed by mutual consent of the parties. The decision may be made retroactive to the termination of the last contract or to the beginning of the dispute.

Either party to the dispute may secure judicial review (§111.60). The grounds on which the award may be set aside are enumerated in the Statute and include "that the order is not supported by the evidence".

The Statute provides independently, and without regard to the pendency of conciliation or arbitration proceedings, that it shall be unlawful for employees of a public utility to strike or to engage in a work stoppage "which would cause an interruption of an essential service"; and that it shall be unlawful for anyone to instigate or induce such a strike or work stoppage (§111.62). Lockouts by public utility employers are similarly forbidden. Violation of this section constitutes a misdemeanor.

The Statute also provides (§111.63) that the Board shall enforce compliance with its provisions, and may sue to enjoin violation.

A subsequent section of the Statute (§111.64) provides that individual employees shall have the right to quit work "unless done in concert or in agreement with others" and that it is the

intent of the subchapter only to prohibit employees from striking or in engaging in a work stoppage in "concert".

The Statute closes with the usual separability clause (§111.65).

Thus, in essence, the Statute prohibits strikes by employees of public utilities, and provides that labor disputes between public utilities and their employees shall be settled by compulsory arbitration.

B. Conflict with the National Act

The labor relations policies embodied in the Labor-Management Relations Act, 1947, differ radically from those which underlie the Wisconsin Statute. Like the Wagner Act which preceded it, the Labor-Management Relations Act relies primarily upon voluntary agreements arrived at through collective bargaining to promote industrial peace while preserving to management and labor the rights essential to a system of competitive free enterprise. The employees' right to strike and managements' right to lockout are, with certain specified exceptions, preserved as essential to a free economy and as incentives to reaching agreement through collective bargaining in preference to a trial of economic strength.

1. *The basic policy to promote voluntary labor agreements through collective bargaining*—Section 1 of the National Labor Relations Act—that act is Title I of the Labor-Management Relations Act, 1947—declares it to be the policy of the United States to encourage "the practice and procedure of collective bargaining". Section 1 likewise declares that protection by law of the right to bargain collectively removes sources of industrial strife and unrest and restores equality of bargaining power between employers and employees. Both of these provisions were carried over into the present law from the Wagner Act. The present National Labor Relations Act likewise retained in Section 8(a)(5), the provision of the Wagner Act making it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, and it added to the Wagner Act new provisions requiring unions to bargain collectively with employers

(Section 8(b)(3)) and defining the obligation to bargain collectively (Section 8(d)). This definition explicitly declares that the "obligation does not compel either party to agree to a proposal or require the making of a concession".

Title II of the Labor-Management Relations Act, which deals with conciliation of labor disputes and with national emergency strikes, likewise begins by declaring in Section 201, "That it is the policy of the United States that—(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining" between employers and unions. It goes on to recite in subsection (b) that the settlement of issues through collective bargaining may be advanced by making available governmental facilities for conciliation and "*voluntary arbitration*". Finally, Section 201(c) recites that it is the policy of the United States that certain labor controversies may be avoided or minimized by making provision for adequate notice of any proposed changes in existing agreement and for the "final adjustment" of grievances regarding the application or interpretation of such agreements. (Italics supplied.)

The same policies to promote voluntary agreement through collective bargaining, to encourage agreements to arbitrate questions of contract interpretation, contracts, but to avoid compulsory arbitration, are articulated in Section 203 of the Act, dealing with the functions of the Federal Mediation and Conciliation Service. Section 203(c) provides that if in a labor dispute the Director of the Service "is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties *voluntarily* to seek other means of settling the dispute without resort" to strike or lock-out. (Italics supplied.) The section further provides, however, that: "The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act."

Section 203 then goes on in subdivision (d) to declare that: "Final adjustment by a method agreed upon by the parties"

i.e. such as arbitration, "is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement".

Section 205 of the Act establishes a National Labor-Management Panel "to advise in the avoidance of industrial controversies and the manner in which mediation and *voluntary* adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country". (Italics supplied.)

Title II of the Labor-Management Relations Act, 1947, also deals with national emergency strikes. It provides (Section 206) that if the President finds that a labor dispute will "imperil the national health or safety", he may appoint a Board of Inquiry. The Board shall report on the facts of the dispute, but may not make any recommendations as to its settlement. After receiving the report of the Board, the President may direct the Attorney General to secure an injunction against the strike or lockout (Section 208). The injunction, however, may continue only for a maximum of 80 days and must be discharged at the end of that period (Section 210). At the end of 80 days, the employees are free to strike and the employer is free to resort to a lockout.

Thus even in dealing with national emergency disputes the National Act does not provide for compulsory arbitration or absolutely ban strikes. Indeed, the Board of Inquiry appointed by the President is not even permitted to make recommendations as to settlement of the dispute.

The Title does recite in Section 209(a) that whenever a district court has issued an 80-day injunction, "it shall be the duty of the parties to the labor dispute . . . to make every effort to adjust and settle their differences, with the assistance" of the Federal Mediation and Conciliation Service. The section goes on to declare, however, that: "Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service".

Thus the Labor-Management Relations Act goes to great pains to make it absolutely clear at every appropriate point that nothing in the nature of compulsory arbitration is con-

templated or permissible under the Act, either in the usual labor dispute or in a national emergency strike.

The Federal Act thus squarely conflicts in its basic policy with the Wisconsin Statute here under consideration.

It has been said that there are only three conceivable labor relations policies. One such policy, and the one which largely prevailed throughout the 19th century and in the first part of this century, is individual bargaining. Under this policy each individual employee must make such terms as he can with his employer. A second possible labor policy is to protect the creation of unions and to encourage collective bargaining between unions and employers. That was the national labor policy adopted in 1935. The third conceivable policy is compulsory arbitration. That is the policy established by the Wisconsin Statute, but it conflicts squarely and basically with the Federal policy.

2. *The right to strike*—Free trade unions can exist and perform their economic functions only if they may strike at appropriate times and on appropriate issues. Genuine collective bargaining likewise can exist only when each of the two parties—management and labor—have real bargaining power. Hence the National Labor Relations Act, pursuant to the national policy to recognize free trade unions as an essential part of a competitive free economy, and to implement the national policy of promoting collective bargaining, recognizes and protects the right of workers to form unions, to bargain collectively, and to strike. The concomitant right of employers to lockout is likewise recognized.

Without the rights to strike and lockout there can be no real collective bargaining. Parties cannot bargain unless they have something to bargain with. In a recent study "Strikes and Democratic Government" (1947) the Labor Committee of the Twentieth Century Fund has pointed out how essential the right to strike is to any real collective bargaining (pp. 12-13):

"In genuine collective bargaining . . . the possibility of a strike or lockout is . . . an ever-present and controlling factor in the realistic processes of collective bargaining. Those processes lose all color of reality if the workers have

not the right to reject management's offer and quit, or if management has not the right to refuse the workers' terms and close the plant. It is the overhanging pressure of this right to strike or to lockout that keeps the parties at the bargaining table and fixes the boundaries of stubbornness in the bargaining conferences . . . Unless the negotiating parties are faced with this possibility of a strike or a lockout, and are forced to examine and accept the consequences of their own decision, they are free from the responsibility that makes genuine collective bargaining possible and produces through it creative results. Thus, for the ordinary labor dispute, the possibility of a strike or lockout is, in the last analysis, the most potent instrument of persuasion."

Section 7 of the National Labor Relations Act accords to employees the right "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".

In addition to these provisions, the right to strike is explicitly recognized in Section 2(3) of the Act and in Section 13, the latter of which provides:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

By these provisions, as this Court recently pointed out in *Automobile Workers v. O'Brien*, 339 U.S. 454, 457, "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike".

That a peaceful strike for higher wages, which is not in violation of an existing contract, is legalized and approved by the Federal Act has been settled since the early days of the Wagner Act. *NLRB v. Mackay Radio and Telegraph Co.*, 304 U. S. 333, 345-347. The Court also held, however, under the Wagner Act, that a sit down strike (*NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240) or a strike in breach of contract (*NLRB v. Sands Manufacturing Company*, 306 U.S. 332) were not legitimate concerted activity within the protection of the Federal Act. On that basis labor violence

was held to be subject to state police control. *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740.

Congress was aware of these decisions when it supplanted the Wagner Act by the present Act, and it specifically intended to continue in effect the existing protection of the right to strike, except as otherwise specifically provided in the new Act. The final clause of Section 13—"or to affect the limitations or qualifications on that right"—was added to the similar provision of the Wagner Act by the Taft-Hartley Act. That this clause was not intended as a limitation upon the right to strike recognized under the Wagner Act is evidenced by the report of the Senate Committee, which states:

"Section 13 has been amended in two respects: (1) By a clause which makes clear that the Wagner Act has diminished the right to strike only to the extent specifically provided by the new amendments to the act; (2) by the addition of the words 'to affect the limitations or qualifications on that right.'

"It should be noted that the Board has construed the present act as denying any remedy to employees striking for illegal objectives (See *American News Co.*, 55 N.L.R.B. 1302, and *Thompson Products*, 72 N.L.R.B. 150). The Supreme Court has interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N.L.R.B. v. Sands Manufacturing Company*, 306 U.S. 332); or in breach of some other Federal law (*Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31); or who engage in illegal acts while on strike (*Fansteel Metallurgical Corp. v. N.L.R.B.*, 306 U.S. 240).

"This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions." Senate Report No. 105, 80th Cong., 1st Sess., p. 28.

That Congress, in enacting the Labor Management Relations Act, specifically intended to guarantee to employees in industries affecting commerce the right to strike to obtain legitimate economic objectives is also evidenced by the statements of Senator Taft, the author of the National Act, upon the floor of the Senate:

"Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems

must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that *we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract.* We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. In the past few disputes finally reached the point where there was a direct threat to and defiance of the rights of the people of the United States.

"We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions . . .

" . . . So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation." 93 Cong. Rec. 3835 (1947) (emphasis supplied).

This statement was quoted in part by the Court in the *O'Brien* case.

The *O'Brien* case is conclusive against the validity of the Wisconsin Statute here in question. In that case the Court held invalid the strike vote provisions of the Michigan Labor Mediation Law. That law prohibited the calling of the strike unless a prescribed procedure for mediation had been followed and unless a majority of the employees in a state-defined bargaining unit had authorized the strike in a state-conducted election. The Court pointed out that Congress had since the Wagner Act expressly recognized the right peacefully to strike for lawful objectives, and that in the Taft-Hartley Act it had "qualified and regulated that right" in some detail (339 U.S. at 454). The Court pointed out that by the latter Act Congress had established certain notice requirements, had forbidden strikes for certain objectives, and had prescribed detailed procedures for strikes which might create a national emergency. The Court then declared (339 U.S. at 454):

"None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."

The Court then went on to add that even if some state legislation in this area could be sustained, the particular statute could not stand because it conflicted with the Federal Act. It pointed out that the Michigan law had different notice requirements from those of the Federal Act, and that it required a strike vote while the Federal law does not. The Court concluded by quoting with approval its earlier reaffirmation in *Auto Workers v. Wisconsin Board*, 336 U.S. 245, 252, of "the principle that if 'Congress had protected the union conduct which the State has forbidden . . . 'the state legislation' must yield.'" (339 U.S. 454)

The Wisconsin Statute here involved conflicts far more basically and directly with the Federal Act than did the Michigan law involved in the *O'Brien* case. The Michigan Statute merely qualified the right to strike and placed certain procedural restrictions upon its exercise. The Wisconsin Statute abrogates the right entirely. A more direct conflict with the Federal Act is difficult to conceive.

The rationale of the Court in *Auto Workers v. Wisconsin Board* likewise supports the conclusion that the present Wisconsin Statute is invalid. In that case the Court upheld an order of the State Board prohibiting recurrent unannounced work stoppages to win unstated ends. The Court held that the conduct in question was not legitimate concerted activity within the protection of the Federal Act. But, as subsequently pointed out in the *O'Brien* case, the Court clearly assumed that had the conduct been a legitimate strike within the protection of the Federal Act there would have been no room for State action.

3. *Other conflicts*—In view of the direct and fundamental clash between the Federal and State Statutes on voluntary agreement versus compulsory arbitration and the right to strike versus a prohibition against striking, it is perhaps supererogatory to point to additional conflicts between the two Acts. There are, however, a number of other conflicts

between the Acts, or possibilities of conflict in their administration by the National and State Boards.

a. *Nature of the obligation to bargain*—The National Labor Relations Act, in Sections 8(a) (5) and 8(b) (3) imposes on both employers and employees the duty to bargain collectively. The nature of this obligation is spelled out at some length in Section 8(d). The latter section states that the obligation to bargain collectively requires the parties to meet at reasonable times and confer in good faith with respect to wages, hours and other conditions of employment and to execute a written contract incorporating any agreement which is reached, if that is requested by either party. Section 8(d) goes on to provide, however, that "such obligation does not compel either party to agree to a proposal or require the making of a concession".

The Wisconsin Act likewise requires public utilities and unions representing their employees to bargain collectively. It requires them "to exert every reasonable effort" to settle their labor disputes by the making of agreements through collective bargaining (§111.52). That requirement to bargain, particularly when viewed in the statutory context of a prelude to compulsory arbitration, in all probability has a content different from that of the Federal Act. The State Statute may well require the making of concessions, while the Federal Act explicitly does not.

At the least, conflicting determinations between the National and the State Boards as to whether an employer or a union has violated its duty to bargain are exceedingly probable. That determination having been entrusted by Congress to the National Board, the State may not confer concurrent jurisdiction upon its creature. *Plankinton Packing Co. v. Wisconsin Board*, 338 U.S. 953.

b. *Scope of the duty to bargain*—The Wisconsin Statute prohibits the arbitrator or arbitrators from making any award "which would infringe upon the right of the employer to manage his business" (§111.58). In one of the cases now before this Court, No. 330, the Union's proposal that certain employees be kept on particular shifts was rejected by the arbitrators on the ground that to grant the request would vio-

late the provision of the statute. (Record No. 330, p. 198).

The National Board has held, however, that under the National Act an employer must bargain with a union with regard to work schedules and the composition of shifts. *Woodside Cotton Mills*, 21 NLRB 42, 54-55; *American National Insurance Co.*, 89 NLRB No. 19.

Here again there is conflict, or at least the probability of it, and it is the National Board which has been empowered by Congress to make the determination.

c. *Unilateral changes in existing contracts*—The State law provides that during the pendency of conciliation or arbitration proceedings, the existing wages, hours, or conditions of employment may not be changed by either party without consent of the other. (§111.50) The National Labor Relations Act, however, requires only that an employer continue in effect the terms and conditions of the existing contract for 60 days after notice of termination or until the expiration date of the contract, whichever is later (Section 8(d)(4)). An employer is, it is true, under certain additional restrictions with regard to unilateral changes, arising out of his duty to bargain collectively and to refrain from unfair labor practices. However, the Board has long interpreted the Act as permitting an employer, if the requirements of Section 8(d)(4) have been met, and an impasse in negotiations has been reached, unilaterally to put into effect changes in wages, hours or conditions of employment which have been offered to the union but rejected by it.

An employer exercising the right accorded him under the National Act would, however, be in violation of the State Act if conciliation or arbitration proceedings were pending.

d. *Effect of voluntary reopening*—The State Act provides for compulsory arbitration not only when no contract is in effect, but when a contract is in effect but the parties have begun negotiations looking to a new contract or a change in the existing contract (§111.57(3)). Thus under the State law if the parties voluntarily reopen negotiations they subject themselves to compulsory arbitration.

The National Act, in contrast, specifies that neither the employer nor the union is under any duty even to discuss

modification of the terms of a contract "if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract" (Section 8(d)), and there is no doctrine under the National Act that either party waives any rights by voluntarily discussing issues not subject to renegotiation under the contract. In that situation, as far as the National Act is concerned, either party may at any time break off negotiations and stand on his rights under the existing contract.

Thus the National Act places no barrier in the way of the voluntary reopening of labor agreements in advance of their expiration dates. Under the Wisconsin Act, however, if an employer or a union enters upon such negotiations, he opens himself to compulsory arbitration with regard to the issues which he has discussed, if no agreement on them is reached.

Under the National Act employers and unions are often quite willing to discuss issues which are not technically open for renegotiation. Under the State Act they certainly would not be.

C. The Labor-Management Relations Act, 1947, Applies to Public Utilities Affecting Commerce Which Are Privately Owned

From its opinion in the present case the Supreme Court of Wisconsin seems to be under the impression that the National Act does not apply to public utilities, and its opinion even seems to suggest that the National Act could not constitutionally apply to public utilities. Thus the Court said (R.):

"Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that the utilities are state agencies. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers."

There is, of course, not the slightest basis in the language of the National Act or in the decisions of this Court, or in any known constitutional doctrine, for these assertions by the Supreme Court of Wisconsin.

The National Act does not either in Title I (the National Labor Relations Act) or in Title II ("Conciliation of Labor Disputes in Industries Affecting Commerce; National Emergencies") draw any distinction between privately owned public utilities whose operations affect interstate commerce and other industries.

It has been settled since the early days of the Wagner Act that the National Labor Relations Act applies to privately owned public utilities if their operations affect interstate commerce. *Consolidated Edison v. NLRB*, 305 U.S. 197; *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18. The National Labor Relations Board long ago rejected the argument advanced by the Supreme Court of Wisconsin that privately owned public utilities should be exempt from the National Act because of the minute regulation to which they are subjected by the states and because of their importance to the localities in which they operate. The National Board pointed out in *El Paso Electric Company*, 13 NLRB 213, 240 (1939) that the National Act does not "distinguish between public utility employees and those otherwise employed". Hence, the National Board has always entertained unfair labor charges and conducted representation proceedings with respect to privately owned public utility plants whose operations affect interstate commerce. Indeed, it has conducted two representation proceedings with respect to the very plant involved in the present case. No decision of the Board taking jurisdiction over a utility has ever been upset by the Courts.

Insofar as the Constitution is concerned, there is, of course, no constitutional barrier to the application of the National Act even to State-owned public utilities if their operation affects interstate commerce or brings them within the scope of any other Federal power. *United States v. California*, 297 U.S. 175.

Publicly owned plants are, however, excluded from the scope of the National Labor Relations Act by Section 2(2) which states that the term "employer" shall not include "the United States or any wholly owned Government Corporation, or any Federal Reserve Bank, or any State or political sub-

division thereof . . .” Therefore, the Federal Act does not apply to a public utility owned by a State or a municipality. It may even be that this definition leaves room for state or local action in emergencies through plant seizure, if by seizure the state or municipality becomes the employer. However that may be, there is not the slightest basis for any assertion that privately owned public utilities are exempt from Federal control either by reason of the language of the Statute or by force of any constitutional doctrine.

II

THE WISCONSIN STATUTE INVADES FIELDS WHICH CONGRESS HAS OCCUPIED

We respectfully submit that in enacting the Labor-Management Relations Act, 1947, Congress occupied a field greater even than the governmental regulation of collective bargaining and of strikes in industries affecting commerce. The broad purposes of the Labor-Management Relations Act (Section 1(b)), its legislative history and its detailed operating provisions lead to the conclusion that Congress was enacting a broad and exclusive labor code governing labor-management relations in ~~industries~~ affecting commerce. We believe that, except where Congress specifically so provided, this labor code leaves to the states only their “usual police powers” (*People of State of California v. Zook*, 336 U.S. 725, 734) to prevent breaches of the peace.

When Congress intended to leave to state control any phase of labor-management relations, it specifically so provided. Section 14(b) of the National Labor Relations Act expressly reserves to the states the power to prohibit closed or union shop agreements. See *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301. Congress also specifically left with the states the power to use their mediation and conciliation services to help the federal conciliation agencies in labor disputes affecting commerce. Sections 202(c), 203(b) and 8(d)(3). In like vein, section 10(a) of the original National Labor Relations Act was amended to permit the National Board to cede to State boards

jurisdiction over any industry except certain specified industries, but only if there were no conflict between the applicable state and federal law. This Court adverted to section 10(a) in *People of State of California v. Zook*, 336 U.S. 725, 732, stating that "when state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so, as in the Taft-Hartley Act, 29 U.S.C. (Supp.) §160(a), 29 U.S.C.A. §160(a)." The inference plainly to be drawn from these explicit determinations that state law should be operative in particular fields or under particular conditions is that Congress meant to leave no other scope for State regulation.

It is not necessary, however, for petitioners to sustain the broad proposition enunciated in the previous paragraph. The Wisconsin Statute prescribes compulsory arbitration and prohibits strikes in an industry affecting commerce. Since, as is clearly the case, Congress occupied the field of governmental regulation of collective bargaining and of strikes in industries affecting commerce, the Wisconsin Statute cannot stand (*Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605), whether or not the National Act is a labor code which except as it specifies otherwise excludes state action in the entire field of labor-management relations.

Congress evidenced its intention to occupy the field of governmental regulation of collective bargaining as the mechanism for promoting labor agreements voluntarily arrived at in two ways: by requiring collective bargaining of employers and unions and specifying in considerable detail the incidents of the requirement, and by refraining from enacting various proposals to have the government write the labor agreement, including proposals for compulsory arbitration of public utility disputes. Congress likewise evidenced its intention to occupy the field of governmental regulation of strikes in industries affecting commerce in the same two ways: First, by provisions it enacted specifically regulating the right to strike; second, by the provisions in derogation of the right to strike which it expressly refrained from enacting including, again, compulsory arbitration of public utility disputes.

We have already reviewed the provisions of the Labor-Management Relations Act relating to collective bargaining, and

those preserving, except as otherwise specified, the right of employees to strike and of employers to resort to lockout.

While preserving in general the right to strike Congress carefully listed certain types of strikes and made them unfair labor practices. Under Section 8(b) (4) of the National Act it is an unfair labor practice for a union or its agents to engage in or encourage any strike for any one of the following objects:

- (A) To require an employer or self-employed person to join a union or an employer organization or to force an employer or any other person to cease dealing in the products of another employer.
- (B) To force or require any other employer to recognize or bargain with an uncertified union.
- (C) To force or require an employer to recognize or bargain with one labor organization if another union is the certified bargaining agent.
- (D) To force or require an employer to assign particular work to employees in one union or in one trade, craft or class, rather than to employees in another union or another trade, craft or class.

In addition to making these actions unfair labor practices, Congress made labor organizations liable for damages resulting from strikes in the forbidden categories (Section 303) as well as providing for injunctive relief (Sections 10(j)-(l)).

Congress not only listed the strikes which would be unlawful, but it also imposed procedural requirements conditioning the legality of strikes in industries affecting commerce. Under Section 8(d) no strike to terminate or modify a collective agreement is permissible in the absence of a sixty-day notice to the other party, thirty-day notices to federal and state mediation agencies, and bona fide negotiations in the intervening period. In addition to making the failure to follow these procedural steps unfair labor practices (Section 8(b) (3)), striking employees in such circumstances lose status as employees and the right to reinstatement. Section 8(d).

Congress also made special provision for strikes in "national emergencies". These provisions, found in Title II of the Labor-Management Relations Act, 1947, have already been outlined supra, p. 12.

These particular regulations of collective bargaining and of the right to strike were adopted by Congress only after consideration and rejection of various other proposals including, specifically, proposals for the compulsory arbitration of public utility disputes. During the legislative processes which preceded the enactment of the 1947 Act, the argument was much pressed upon Congress that labor disputes between public utilities and their employees should be handled differently from other labor disputes because of the harsh consequences to the public which might result from strikes shutting down public utilities. The argument, however, failed to persuade Congress: all proposals for compulsory arbitration of public utility disputes, or for special restrictions upon the right of public utility employees to strike, were rejected.

The first session of the 80th Congress had before it, along with the proposals which were eventually embodied in the 1947 Act, five separate though identical bills providing for compulsory arbitration of public utility disputes. See H. R. 17, 34, 68, 75 and 76, 80th Congress, First Session. These bills provided that in the event of labor disputes threatening curtailment of "transportation, public utility, or communication services, or supplies of articles or commodities essential to the public health or safety" the President should order maintenance of the status quo for thirty days, and that if the parties were unable to agree during that period the President should submit the issues to compulsory arbitration. The bills provided for the appointment of a permanent arbitration panel, from which an arbitration board would be specially selected for each dispute by the parties, just as under the Wisconsin Act. The award of the board would be binding upon both parties for six months, as compared with one year under the Wisconsin Act.

Each of the five authors of these bills testified in their support before the House Education and Labor Committee: Congressman Case of New Jersey (Hearings on Bills to Amend and Repeal the National Labor Relations Act, Eightieth Congress, 1st Sess., Vol. 5, p. 2896); Congressman Auchincloss (p. 2907); Congressman Hesselton (p. 2911); Congressman Herter (p. 2912); and Congressman Hale (p. 2921). Edward O'Neal, President of the American Farm Bureau Federation,

also urged the compulsory arbitration of public utility labor disputes (p. 1799).

Extensive testimony in opposition to these proposals was likewise given before the House Committee. Lewis Schwellenbach, then Secretary of Labor, testified at length in opposition to the compulsory arbitration proposal embodied in the five bills. He reviewed the experience of various foreign countries with the compulsory arbitration of labor disputes, and mentioned the experiments along those lines undertaken in this country some years ago by Kansas and Colorado. Secretary Schwellenbach also discussed the War Labor Board's handling of labor disputes during World War II, which he stated was "a species of compulsory arbitration".

The Secretary pointed out (House Hearings, p. 3033):

"Compulsory arbitration is the antithesis of free collective bargaining. Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminates free collective bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretense of bargaining in anticipation of a more favorable award from an arbitrator than would be realizable through their own efforts.

"The net result would be a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures, and it is obvious that with the growth of such an attitude, the use of conciliation and mediation procedures would decline concurrently.

"Conciliation and mediation are instruments of free collective bargaining, aids to the parties in arriving at voluntary and mutually acceptable settlements. Compulsory arbitration would discourage their use in the same degree that it would lessen the inclination to bargain freely in arriving at settlements in labor disputes.

"If compulsory arbitration is to succeed in eliminating work stoppages, it is clear that it can do so only by abolishing or restricting the right to strike.

"Compulsory arbitration simply means that the Government writes a contract for the parties."

Testimony against the proposals was also given by William Green, President of the American Federation of Labor (House Hearings, pp. 1630, 1658) and by Joseph A. Beirne, then President of the National Federation of Telephone Workers, now the Communication Workers of America, CIO (House Hearings, pp. 2203, 2240).

Proposals for compulsory arbitration, particularly in public utility disputes, were also considered by the Senate Committee. See e.g. the colloquys between Senator Aiken and Joseph A. Beirne (Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., p. 1183) and between Senator Morse and Walter Reuther (p. 1307); and the testimony of Ludwig Teller (pp. 265-268), Joseph A. Beirne (pp. 1182-3, 1207, 1219), and Walter Reuther (p. 1307, 1326).

The report of the Senate Committee (Senate Report No. 105, 80th Cong., 1st Sess.), strongly opposed compulsory arbitration. It states at the outset (p. 2):

"The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining. Government decisions should not be substituted for free agreement but both sides—management and organized labor—must recognize that the rights of the general public are paramount."

A subsequent portion of the report dealing with "settlement of labor disputes" reads in part as follows (pp. 13-14):

"In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of the suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation.

"Under the exigencies of war the Nation did utilize what amounted to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Govern-

ment, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining. It is difficult to see how such a system could be operated indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces. Moreover, the wartime experiment of the 30-day waiting period under the War Labor Disputes Act was not a happy one, since it was too frequently used as a device for bringing to a rapid crisis disputes which might have been solved by patient negotiation. For similar reasons except in dire emergencies the establishment of fact-finding boards or over-all mediation tribunals also cause dubious results. Recommendations of such bodies tend to set patterns of wage settlements for the entire country which are frequently inappropriate to the peculiar circumstances of certain industries and certain classes of employment.

"It is our conclusion that by modifying some of the practices under the Wagner Act which tend to destroy the balance of power in collective-bargaining negotiations by restraining one party to a dispute without restraining the other, Congress would go a long way toward making collective bargaining the most effective method of solving the industrial relations difficulties."

In line with the Report, the bill reported out by the Senate Committee contained no provision for compulsory arbitration or for special treatment of public utility strikes: It resembled, in general, the bill finally passed.

The issue of compulsory arbitration versus collective bargaining was extensively debated on the floor of the Senate. Senator Wiley of Wisconsin submitted a 14-point program, of which point 12 declared (Legislative History of Labor-Management Relations Act, 1947, Volume 2, p. 993):

"Where all other efforts fail and wherever the public interest is threatened by a proposed strike in a public utility like electricity, transportation, telephone, gas, or a key Nation-wide industry like coal or steel, Congress should set up means for compulsory arbitration of disputes. This means that the settlement of the dispute should be made by an impartial arbitrator or board of arbitrators which would hand down the decision which would then be binding on both management and labor. Strikes in utilities

and key Nation-wide industries must be outlawed. The public welfare must be protected."

Senator Taft, however, then the Chairman of the Senate Committee, was not in accord with these views. In a statement which has already been quoted *supra* p. 16, and which was quoted in part by the Court in the *O'Brien* case, he declared that: "The solution of our labor problems must rest on a free economy and on free collective bargaining." He rejected "compulsory arbitration" or any other system which would give the Government the power to fix wages, including specifically the compulsory arbitration of public utility labor disputes. He declared (Legislative History of the Labor-Management Relations Act, 1947, Volume 2, p. 1007):

"I feel very strongly that so far as possible we should avoid any system which attempts to give to the Government this power finally to fix the wages of any man. Can we do so constitutionally? Can we say to all the people of the United States, 'You must work at wages fixed by the Government'? I think it is a long step from freedom and a long step from a free economy to give the Government such a right.

"It is suggested that we might do so in the case of public utilities; and I suppose the argument is stronger there, because we fix the rates of public utilities, and we might, I suppose, fix the wages of public-utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that it is necessary to do is to forbid strikes, fix wages, and compel men to continue working, without consideration of the human and constitutional problems involved in that process.

"If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation.

Further on during the course of this statement Senator Taft said (p. 1008):

"We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.

"We have felt that perhaps in the case of a general strike, or in the case of other serious strikes, after the termination of every possible effort to resolve the dispute, the remedy might be an emergency act by Congress for that particular purpose."

The issue of whether to provide for compulsory arbitration was likewise extensively discussed on the floor of the House. (See e.g. Legislative History of the Labor-Management Relations Act, 1947, Volume 1, pp. 577-581, 586, 588, 589-590, 669, 687, 805, 821 and 868). The bill reported out by the House Committee made no provision for compulsory arbitration. Its provisions for "Strikes Imperilling Public Health and Safety" were, however, broad enough to cover public utility strikes, since they were to apply to labor disputes threatening "curtailment of interstate or foreign commerce in transportation, public utility, or communication services essential to the public health, safety or interest". (Section 203(a) of H. R. 3020, found in Legislative History of the Labor-Management Relations Act, 1947, Government Printing Office, 1948, Volume 1, p. 87) The bill passed the House of Representatives in this form.

The comparable provisions of the bill passed by the Senate applied, however, only to strikes threatening to "imperil the national health or safety". (Section 206 of S. 1126, Legislative History, Volume 1, p. 146.) This provision obviously is not broad enough to cover public utility strikes whose effect is

not sufficiently widespread to have an impact upon the country as a whole, even though they may affect interstate commerce. Nevertheless, the Senate provisions were accepted by the Conference Committee in lieu of the House provisions, and are found in the law as finally passed. (See House Report No. 510, 80th Cong., 1st Sess., pp. 63-64.) Congress thus decided to regulate public utility labor disputes having only regional effects simply under Title I of the Act—that is, under the National Labor Relations Act. Public utility disputes of national impact, however, do come within Title II, and the provisions of that title have been invoked by the government during a telephone strike. Even in “emergencies” of national impact, however, the Federal Act makes no provision for compulsory arbitration.

The rejection by Congress of all proposals for compulsory arbitration and particularly of proposals for compulsory arbitration of public utility disputes was thus a deliberate decision to rely instead on collective bargaining, plus, in national emergencies, the fact-finding boards and the 80-day injunction. Plainly Congress did not mean to leave to the states any authority to establish in industries affecting interstate commerce a different policy. Congress occupied the field fully and completely. In the language of Senator Taft, Congress decided to “cover the whole subject” of collective bargaining.*

After considering a myriad of proposals for dealing with strikes in industries affecting commerce, including proposals for compulsory arbitration of public utility disputes, Congress

* During a colloquy in the Senate Committee Hearings between Senator Taft and Secretary Schwellenbach as to the constitutionality of giving to the Federal courts jurisdiction over suits on collective bargaining agreements, Senator Taft stated: “Mr. Secretary, of course, the basis for the jurisdiction is the Federal law—in other words, we are saying that all matters of collective-bargaining contracts shall be made in certain ways; that both parties shall be compelled to negotiate them, and they furnish the solution for the difficulty, which is an interstate commerce difficulty. I don’t quite see why suits regarding such collective-bargaining contracts, when made, are not properly the subject of Federal law arising under the laws of the United States, therefore subject properly to the jurisdiction of the Federal courts. I don’t understand how we can cover the whole subject, as we do, in Federal laws, and then say, when you come down to suing about it, that the Federal court has no jurisdiction. I don’t understand that.” (Senate hearings, p. 57, *Italics supplied*).

outlawed various types of strikes; it provided a carefully devised procedure for notices, mediation and bona fide negotiation prior to striking; it made special provision for national emergency strikes. It rejected all proposals for requiring compulsory arbitration of public utility disputes. These decisions by the Congress must be regarded under the decisions of this Court as a plain indication that the Federal Government has occupied the field and that the State may not, therefore, impose additional restrictions or regulations upon collective bargaining or strikes in industries affecting commerce.

III

THE WISCONSIN STATUTE VIOLATES THE 13TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

In the interest of conserving the Court's time, the petitioners herein are not separately briefing this question, but will rely on the briefs of the petitioners in Nos. 329 and 330.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted,

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December, 1950.

APPENDIX

Wisconsin Statutes, 1947

CHAPTER 111, SUBCHAPTER III.

Public Utilities.

111.50 *Declaration of Policy.* It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 *Definitions.* When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employees.

(2) "Essential service" means furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin Employment Relations Board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 *Settlement of Labor Disputes Through Collective Bargaining and Arbitration.* It shall be the duty of public utility employers and their employees in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 *Appointment of Conciliators and Arbitrators.* Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

111.54 Conciliation. If in any case of a labor dispute between a public utility employer and its employees, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employees are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 Conciliator Unable to Effect Settlement; Appointment of Arbitrators. If the conciliator so named is unable to effect a settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 Status Quo to Be Maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

111.57 Arbitrator to Hold Hearings. (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in dispute.

Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The over-all compensation presently received by the em-

ployees having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employees. The foregoing enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 *Standards for Arbitration.* The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 *Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity.* The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit of the county wherein the dispute arose or where the majority of the employees involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay

shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be a matter for collective bargaining or decision by the arbitrator.

111.60 *Judicial Review of Order of Arbitrator.* Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

111.61. *Board to Establish Rules.* The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 *Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty.* It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to

conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 Enforcement. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 Construction. (a) Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employees, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 Separability. It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereof.

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In The
Supreme Court
of the United States
October Term, 1950

UNITED GAS, COKE AND CHEMICAL WORKERS
OF AMERICA, CIO, ARTHUR ST. JOHN,
THOMAS LANSING, AL FUHRMAN,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ~~THE UNITED STATES~~
Wisconsin

Brief of Respondent

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OPINIONS BELOW

The opinion of the Circuit Court of Milwaukee County (R.) is unreported. The opinion of the Wisconsin Supreme Court of which a copy is printed as Appendix B at page 16 of the brief of petitioner for the writ herein, is reported in 258 Wis. 1, N. W. 2nd

JURISDICTION

The mandate of the Supreme Court of Wisconsin, affirming the Circuit Court of Milwaukee County, was entered on November 8, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

1. Is the judgment in *United G., C. and C. Workers v. Wis. E. R. Board*, (1949) 255 Wis. 154, 38 N. W. 2d 692, *res judicata* and a bar to further determination of the constitutional issues in this action.

2. May a state in the exercise of its police power compel arbitration when collective bargaining reaches an impasse or stalemate and forbid a strike in a labor dispute between a union and a public utility where

(1) The utility operations are local in character and do not involve the "national health or safety" so as to invoke the "emergency provisions of the Labor Management Relations Act 1947, 61 Stat. 155-156, 29 U. S. C., Supp. 3 §176-180 and where

(2) A court of competent jurisdiction has found in proceedings under the statute that a work stoppage by the union in the supply of such essential public utility service will create an emergency resulting in irreparable injury to the citizens of such state.

WISCONSIN STATUTES INVOLVED

The pertinent State statutes are Subchapter III of Chapter 111, being secs. 111.50 to 111.65, Wisconsin Statutes and Wisconsin Statutes section 269.56, providing for declaratory judgment, subsecs. 1, 2, 11 and 12, are printed in the Appendix to state official Appellee's brief in Case No. 302.

FEDERAL STATUTE INVOLVED

The federal statute involved is the Labor Management Relations Act, 1947, copies of which we are advised will be provided the court by counsel for the National Labor Relations Board.

STATEMENT

Prior to October 5, 1949, the membership of the petitioner United Gas, Coke and Chemical Workers of America, Dist. 7, Local 18, CIO (hereinafter called the "union") had authorized the negotiating committee of the union to call a strike against the Milwaukee Gas Light Company (hereinafter called the "company" or "employer",) and on October 4, 1949, the committee, consisting of Arthur St. John, Thomas Lansing and Al Fuhrman, ordered the strike to commence at 6:00 A. M., October 5, 1949. At 11:00 o'clock A. M. the public was advised to curtail consumption of gas (R. 5) and an appeal to the consumers of gas was made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could

be done with the main pumping facilities; the fire had to be pulled from the boiler, reducing the steam pressure and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that air would not get into the mains, so as to prevent any explosion due to the mixture of gas and air in the distribution system; the send-outs dropped to 25% of what they had been previously (R. 6). Low pressure in the system created a dangerous condition wrought with the possibility of infinite injury to the public. The public was advised by radio broadcasts and through the newspapers to shut off appliances and shut off the service at the meter. The service was not resumed until October 6, 1949.

Upon application of the Wisconsin Employment Relations Board (hereinafter referred to as "board"), the lower court entered a restraining order at 12:55 P. M. on October 5, 1949 (R. 6), requiring the petitioner to show cause on October 7, 1949, why temporary relief asked by the board should not be granted and directing the petitioners and Walczak, pending the hearing, "to absolutely desist and refrain from calling a strike, going out on strike or causing any work stoppage or slow down which would cause an interruption of the services of the Milwaukee Gas Light Company" and to restrain them from instigating a work stoppage by picketing or otherwise that would interrupt the service of the company (R. 14-15):

The restraining order was served by the deputy sheriff on the union by serving its president, Arthur St. John and upon him personally and upon Chester Walczak, International Representative at a meeting of a large group of the members of the union at Bohemian Hall at about 2:00 P. M. on November 5. Thomas Lansing (R. 58-59) and Alvin

C. Fuhrman had notice of the restraining order (R. 53). Chester Walczak and Arthur St. John told the men the paper served was an order to go back to work, but no statement was made calling the men back to work (R. 6).

A picket line was maintained at the premises of the Coke Company from 2 or 3:00 P. M. and continued there throughout the evening of October 5, 1949.

The Coke Company is a wholly owned subsidiary of the Gas Company. In October 1949 the Coke Company supplied about 55 to 60% of the gas distributed by the Gas Company. Because of the relationship between the Coke Company and the Gas Company, the Coke Company is a public utility employer and the public utility anti-strike law applies to it (R. 7). The present proceeding does not relate back to the action of the union voting the strike or the act of the negotiating committee calling the strike. It relates to matters occurring subsequent to the signing of the order and the service of same at about 2:00 P. M. on October 5 (R. 7). The order required the union, St. John, Walczak and Lansing to take immediate steps to notify all employees called out on strike to resume service forthwith; because of the seriousness of the situation already referred to resulting from the partial or complete stoppage of the essential service of furnishing gas to the public, the order required immediate compliance (R. 7).

On Arthur St. John, president of the union, a member of the executive board and of the negotiating committee, on Thomas Lansing, a member of the executive board of the negotiating committee and on Alvin C. Fuhrman, vice-president of the union and a member of the executive board of the negotiating committee was placed the responsibility by vote of the union to call the strike and upon them rested

the responsibility after the service of the restraining order to revoke the call to comply with the order of the court. The language of the court order is direct and unambiguous: It demanded something to be done. "Take immediate steps to notify all employes called out on strike to resume service forthwith" (R. 7). The petitioners' union and Arthur St. John, Thomas Lansing and Alvin C. Fuhrman were proceeded against and convicted of contempt in violating the order of the court. Chester Walczak and thirteen other persons were found not guilty of contempt of violation of October 5, 1949 order (R. 14).

As appears from the record in Case 302, pages 79 and 80, by way of stipulation, which stipulation was before the trial court below in this case the petitioners herein to-wit: the union and Thomas Lansing, by amended complaint dated October 13, 1948, commenced an action in the Circuit Court for Milwaukee County, Wisconsin, as plaintiff against the Wisconsin Employment Relations Board and the Milwaukee Gas Light Company praying the court to determine and declare the rights of the parties and to declare Subchapter III of Chapter 111 of the Wisconsin Statutes 1947 unconstitutional and invalid and to give such further relief by way of declaration of the rights of the party as might be lawful, just and proper.

Defendants in the Declaratory Judgment Action interposed a general demurrer and after trial of the action upon issues raised by the demurrers, judgment was entered determining the Wisconsin Statute to be valid. The judgment provided:

"It Is Hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid

and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947 [29 U. S. C. A. §141 et seq.], and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, * * * any rights, privileges or protection secured to them under either of said Constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.'"

The judgment of the Circuit Court was appealed to the Supreme Court of Wisconsin (R. 4). *United G., C. and C. Workers v. Wis. E. R. Board*, (1949) 255 Wis. 154, 38 N. W. 2d 692. There the judgment of the Circuit Court was affirmed. No appeal was taken from the Wisconsin Supreme Court to the United States Supreme Court.

In the case at bar, arising from the same employment relationship, the lower court held that the judgment in the Declaratory Judgment Action involved the same parties and the same issues and was for the same purpose as the proceedings in the case at bar and that the constitutional issues were considered in the former case and decided therein adversely to petitioners and concluded that the judgment in the earlier action is a final and conclusive adjudication and *res judicata* upon the question of the validity of Subch. III of Ch. 111 of the Wisconsin Statutes and precludes the petitioners from raising the same issues in the present proceedings (R. 4).

The lower court thereupon entered its findings of fact and conclusions of law and adjudged the petitioners guilty of contempt in violating the order of the court of October 5, 1949. Appeal was taken to the Wisconsin Supreme Court and the judgment of the Circuit Court was affirmed on November 8, 1950; with respect to the constitutional question, the Wisconsin Supreme Court cited its prior holding, *United G., C. and C. Workers v. Wis. E. R. Board*, (1949) 255 Wis. 154, 38 N. W. 2d 692, which was held by the lower court to be *res judicata* (R.) to petitioners' attempts to raise the constitutional issues.

ARGUMENT

I.

THE STATE COURT JUDGMENT IN *UNITED GAS, COKE AND CHEMICAL WORKERS v. WISCONSIN EMPLOYMENT RELATIONS BOARD* (1949) 255 WIS. 154, 38 N. W. 2d 692, IS RES JUDICATA AS TO ISSUES SOUGHT TO BE RAISED ON THIS APPEAL.

This section of our argument is printed^o commencing at page 5 in our brief filed in No. 302 and is not reprinted here.

II.

THE EXERCISE BY THE STATE OF ITS POLICE POWER TO PROTECT ITS CITIZENS IN AN EMERGENCY SITUATION FROM IRREPARABLE INJURY IS NOT REPUGNANT TO FEDERAL LAW OR CONSTITUTION.

Our argument in support of this proposition is presented in our brief in case No. 329 and 330, commencing at page 7.

III.

THE NO-STRIKE AND COMPULSORY ARBITRATION PROVISIONS OF THE WISCONSIN ACT ARE NOT INCONSISTENT WITH THE SCHEME ADOPTED BY CONGRESS FOR REGULATING COLLECTIVE BARGAINING AND STRIKES.

The regulation of the collective bargaining process claimed on behalf of the National Labor Relations Board, at page 32 of its brief is not applicable to the case at bar. When private negotiations have reached an impasse or stalemate, there is no duty on the part of a disputant to bargain collectively. The duty to bargain has several limitations. Teller, vol. 2, sec. 327, p. 880. One of these is that the duty to bargain ceases when the negotiations have reached a stalemate. *National Labor Relations Board v. Sands Mfg. Co.*, 96 Fed. 2d 721, affirmed by 306 U. S. 332, 59 S. Ct. 508, 83 S. ed. 682*. Accordingly, where there is no duty to bargain, no unfair labor practice can arise from a refusal to bargain. Where there is no unfair labor practice, the federal board does not provide a remedy.

It is asserted by the state board, since the Wisconsin statute is applicable only where collective bargaining has reached an impasse, or stalemate, that no conflict between federal and state acts can arise.

The state power may operate certainly where the federal board is not able to act.

CONCLUSION

Respondent respectfully prays that the judgment of the lower court be affirmed.

Respectfully submitted,

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Assistant Attorney General

Attorneys for Respondent

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DEC. 6 1950

IN THE
Supreme Court of the United States

October Term, 1950

No. 438

**UNITED GAS, COKE AND CHEMICAL WORKERS OF
AMERICA, CIO, ARTHUR ST. JOHN, THOMAS LAN-
SING, AL FUHRMAN,**

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

**MOTION TO DISPENSE WITH PRINTING OF THE
RECORD ON CONSIDERATION OF PETITION FOR
CERTIORARI**

AND

**MOTION TO EXPEDITE CONSIDERATION OF PETITION
FOR CERTIORARI**

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IN THE
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United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C.I.O., Arthur St. John, Chester Walczak and Thomas Lansing, by their counsel Arthur J. Goldberg and Thomas E. Harris, move the court (a) to dispense with the printing of the record on consideration of their petition for certiorari filed herewith and (b) to expedite consideration of the said petition for certiorari. In support of their motion, petitioners show as follows:

1. There is an obvious need for expedition in the present case. The Court has before it two cases, Nos. 302 and 329-330, which present issues substantially the same as those presented in the instant case. No. 302, in fact, arises out of the

same facts as are involved in this case. Nos. 302 and 329-330 are set for argument in the week of January 8, 1950. The petitioners believe that the instant case clarifies the issues presented in Nos. 302 and 329-330 and presents to the Court a record which should be considered by the Court in dealing with the important issues present in all three cases. Accordingly, petitioners believe that the Court should, if possible, grant certiorari in the present case and set it for argument with the other cases in the week of January 8, 1950.

2. The Attorney-General of Wisconsin, counsel for the respondent Wisconsin Employment Relations Board, recognizing that the instant case presents issues which should be considered along with those presented in Nos. 302 and 329-330, has orally informed counsel for the petitioners that he will not object to the granting of certiorari in this case or to the consideration of the case along with Nos. 302 and 329-330, in which the Wisconsin board is also respondent. A letter confirming this information will, we believe, be forwarded directly to the Court by the Attorney-General.

3. The instant case was decided by the Supreme Court of Wisconsin on November 8, 1950. Petitioners' present counsel were not retained in that capacity until the week of November 27, 1950. The briefs in the Supreme Court of Wisconsin, which contain as appendices the parts of the record relied upon by the parties in that Court, were not received by present counsel until December 1, 1950. In view of the time limitations involved, petitioners' counsel were unable to obtain a properly certified copy of the record in time to have said record printed for consideration with the petition for certiorari.

4. Petitioners' present counsel have obtained, and filed with the clerk for distribution to the Court as Appendix C to their petition, nine copies of petitioners' brief in the Supreme Court of Wisconsin. This brief contains as an appendix, on pages 101 to 219, all of the relevant portions of the record below. A properly certified copy of the record is being filed simultaneously with the Clerk of this Court, but, as heretofore stated, it has been impossible in the short time available to have this certified record printed. If the petition for certiorari is granted, the petitioners will promptly submit to the Court, in

place of the uncertified appendix to their brief below, a properly printed and certified record which will include the opinion of the Wisconsin Supreme Court. Pending the submission of this printed record, the petitioners have printed a copy of the opinion of the Wisconsin Supreme Court as appendix B to their petition for certiorari.

5. The Court thus has before it, in printed form, all of the material necessary for consideration of the petition for certiorari. Counsel for the respondent does not oppose the granting of the petition. It is respectfully requested, therefore, that the Court consider the petition without waiting for the formality of reprinting the record and that, on such consideration, the Court grant the petition and set the case for argument with Nos. 302 and 329-330.

Respectfully submitted,

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